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Claims of imperialism: the common legal basis of anti-imperialism in international and regional human rights organisations

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**Submitted as part of the requirement for Doctorate in Law
Birkbeck, University of London**

DECLARATION

**The work presented in this thesis is my own work and is submitted as
part of the requirement for the degree Doctorate in Law**

Signed

Frederick Cowell

ABSTRACT

Opposition to an international organisation with legal powers to protect human rights describes both the legal process of non-compliance with an organisation and political attacks on the organisations legitimacy. Opposition is caused by an organisation's legal structure, in particular the powers that organisations have to encourage compliance with international human rights law. This study examines anti-imperialist opposition – which is opposition broadly predicated on the notion that human rights law and its enforcement are a continuation of colonial-imperialism or a form of neo-imperialism. When analysing opposition from the Third World bloc and other postcolonial states within the UN Commission on Human Rights and treaty bodies, it is possible to discern a distinct form of anti-imperialist opposition. This was in part because of international law's origins in the colonial-imperial era and the perpetuation of inequalities between different states after decolonisation. But forms of anti-imperialist opposition continued in regional organisations, such as the African Commission on Human and Peoples Rights, created outside of this broader imperialist context. This study concludes that there common elements in the legal structure of human rights organisations which are predicated on an imperialist form domination. This explains the persistence of anti-imperialist opposition which is a major factor affecting the functioning of international human rights organisations.

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Dedication

Dedicated to the memory of my Grandmothers, Audrey Falconer and Patience Prashad, who lived through the end of empire in England and India and left a grandson fascinated by it

Introduction

“What right have you to tell these lies?” yelled the High Commissioner of Papua New Guinea at the assembled delegates throwing down a report from the Commonwealth Secretariat. It was a Tuesday afternoon in 2009, at the Democracy and Human Rights session of the Commonwealth Heads of Government Meeting’s (CHOGM) – a pre-meeting forum for foreign ministers to discuss various human rights issues. Polite awkward mummers from the massed foreign secretaries, officers of Non-Governmental Organisations, and bureaucrats greeted the High Commissioners outburst.¹ Marlborough House in Mayfair created suitably luxurious surroundings for an impressive-sounding-but-otherwise-boring meeting of the organisation. The High Commissioner continued lambasting the report (which criticised some aspects of Papua New Guinea’s criminal justice system) calling it “colonialist.” Feet shuffling and coughs greeted this and the Chairperson diplomatically tried to move the meeting on.

What was going on that rainy Tuesday afternoon was an example of anti-imperialist opposition to a supranational organisation with a mandate to protect human rights. A supranational human rights organisation is an organisation with legal powers to protect human rights within sovereign states. It can exist at either a regional or an international level but the most important feature is that its legal authority is independent from its member states. Opposition broadly describes the process where a member state of an organisation attempts to impede its operation. Sometimes a state’s refusal to cooperate with a human rights organisation is an attempt to promote a particular ideological cause. In other cases, opposition is a reaction by the non-cooperating state to the perceived encroachment of an organisation upon their sovereignty.

Imperialism is an important cause of the seeming dysfunction of international law and explains why some states oppose the application of international human rights law and the organisations created to enforce it. To understand imperialism it is necessary to distinguish inherent imperialism from the imperial context of international human rights law. The criticism that human rights organizations are imperialist is often made by postcolonial states - countries that came into being through the legal process of decolonization in the twentieth century. International law evolved in the context of sixteenth century colonial-imperialism and

¹ The author of this work was one of those NGO delegates.

was formalised into system of law that bound states in the late eighteenth century. International law in this period excluded those entities that weren't states and justified colonial rule. International organisations, which emerged as distinct entities in international law in the early twentieth century, preserved the powers of many colonialist states building on its colonial-imperial foundations. This is the imperial context of international law and was the basis of much of the criticism from postcolonial states that international organisations with the power to protect human rights were imperialist. Their legal structure preserved colonial-era inequalities and enforced a set of laws that predominantly reflected the interests of formerly colonialist states. But even when postcolonial states attempted to construct regional human rights instruments, outside the imperialist context of international law, anti-imperialist attacks on these organisations continued. This is because human rights organisations utilise an inherently imperialist legal structure, one which envisages a legal relationship of dominance of the organisation over a state's law making powers, which whilst in practice is often not effective, is akin to imperialism.

There have been numerous studies on compliance with international and regional human rights organisations, what this study seeks to do is to broaden the scope and direction of this enquiry by analysing opposition to human rights organisations.² Opposition covers both instances of legal non-compliance with an organisation and political attacks made upon organisations by state parties, either during the process of its formation or during its operation. The first two chapters of this study theorise the nature of opposition itself before going onto to look at anti-imperialist opposition. This is opposition premised on the notion that a human rights organisation, by fulfilling its mandate to protect human rights, is engaged in a form of imperialist dominance. Anti-imperialist opposition was not just a reaction to the content of international law but rather is a response to the fact that any attempt by a supranational organisation to enforce human rights law in a sovereign state is inherently imperialist. Whilst it is possible to decolonise human rights law, separating it from the imperialist context of its origins, it is not possible to decolonise its enforcement. The legal structures required to enforce human rights law at the supranational level require a relationship of legal dominance over the state akin to forms of imperialism. This study argues that this is at the root of some instances of opposition. This introductory chapter outlines this study's main concepts before detailing the structure of future chapters.

² Some of the studies on this point discussed in later chapters include Sonia Cardenas *Conflict and Compliance: State Responses to International Human Rights Pressure* (University of Pennsylvania Press 2010). Emilie Hafner-Burton *Making Human Rights a Reality* (Princeton University Press 2013). Courtney Hillebrecht *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (CUP 2014).

Supranational Organisations and Opposition

For present purposes, a supranational organisation is taken to be an inter-governmental body that possesses its own form of legal identity and restricts its membership to entities recognised as states. An international organisation is open to all states to become members whereas regional organisations are restricted to states in a specific geographic location. As Chittharanjan Amerasingh notes, supranational organisations possess their own independent institutions that can (to an extent) act independently from the decision-making organs of the governments of member states.³ Human rights organisations, as discussed in this study, are a subset of organisations with legal powers to protect and international human rights law in states which are members of the organisation. This term includes both organisations that are constructed solely for the purpose of protecting human rights and organisations constructed for another purposes but possessing legal powers to protect human rights.

An example of an international human rights organisation, which is discussed in chapter one, is the Human Rights Committee (HRC) – the treaty body of the International Covenant on Civil and Political Rights (ICCPR). Under the ICCPR states are expected to submit periodic reports to the HRC concerning their implementation of the rights contained in the ICCPR. The HRC then uses these reports as a basis for reviewing a state's compliance with the substantive rights protected by the ICCPR. States can also sign up to Optional Protocol One of the ICCPR, which gives individuals the right to petition the HRC if they believe their government has abused their rights under the ICCPR.⁴ The HRC is comprised of experts serving in an individual capacity but also works closely with other bodies comprised of state representatives, such as the UN Human Rights Council. The powers that the HRC has to review reports, make recommendations to states and decide on individual petitions are collectively the HRC's protection mandate.

A protection mandate is the set of legal powers that a human rights organisation has to make states comply with international human rights law. This can include the power to take some form of action against a member state that is in violation of international human rights law. It can also involve exercising political pressure on the state to change its laws; taking action such as suspending the state from the organisation; or in extreme cases, placing measures on the state such as diplomatic or economic sanctions. A protection mandate can be distinguished

³ Chittharanjan Amerasinghe *Principles of the Institutional Law of International Organisations* (CUP 2002) 10.

⁴ Optional Protocol One of the ICCPR 1966 171 UNTS 999.

from a purely promotional mandate, which is where an organisation sets out the standards of international human rights law but makes no comment and takes no action over a state's practice in implementing those standards. The ability to require a member state to change its laws in order to bring them into line with international human rights law is an essential part of an organisation's protection mandate. This power directly conflicts with a states sovereign prerogative to make and unmake laws which has been the defining feature of sovereignty since the seventeenth century. However, another vital component of sovereignty is the ability of states to restrict their future actions by way of international agreements. In a sense, Magdela Martinez argues, all supranational organisations represent "the erosion of the traditional notion of state sovereignty".⁵ However protection mandates empower an organisation to make a normative claim about the content of a state's laws that is both wide ranging and on-going. Human rights organisations with a protection mandate explicitly attempt to assist the citizens in a state by putting external pressure on that state's government to change its laws – a process which implicitly challenges the state's monopoly on law making over their citizens and has relatively few direct benefits for them.⁶

The legal obligation upon states to comply with a human rights organisation differs if the organisation is a UN based organisation rather than the product of an international treaty.⁷ In the former case the legal obligation upon states will be rooted in the political and legal structures of the UN Charter. Organisations that are treaty based are subject to the international law of treaties. Article 31 of the Vienna Convention on the Law of Treaties requires a signatory state to interpret a treaty in "light of its object and purpose" and take into account "subsequent agreements" indicating that a state is required to comply with the decisions of an organisation created by a treaty to interpret its provisions.⁸ The existence of a legal obligation upon a state to comply with an organisation's decisions however does not automatically confer legitimacy on that organisation, as the existence of an obligation means that there is a requirement to do something, not that the requirement is itself legitimate.⁹ Judgements about the legitimacy of international regimes, Allen Buchanan argues, cannot be simply "reduced to statements of legal fact" or coercion, in the same way arguments about the legitimacy of the law in general cannot be reduced to the fact that the citizen is coerced

⁵Magdela Martinez *National Sovereignty and International Organisations* (Martinus Nijhoff 1996) 8.

⁶ Beth Simmons terms this the inverse legitimacy conundrum; Simmons *Mobilizing for Human Rights International Law in Domestic Politics* (CUP 2009) 126.

⁷ See Nigel Rodley 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementarity of Competition?' (2003) 25 HRQ 882, 883.

⁸ Article 31(1) and (3)a *Vienna Convention on the Law of Treaties*, 1969 115 UNTS 331.

⁹ See Dapo Akande 'International Organizations' in Malcolm Evans (ed.) *International Law* (2nd ed. OUP 2006).

into obeying the law.¹⁰ The legitimacy of law is usually predicated on some wider normative justification, such as the democratic mandate of lawmakers. Supranational organisations often maintain that their legitimacy arises out of their ability to protect individual's rights and maintain a higher form of justice.¹¹ This has broad traction because as Jack Donnelly notes human rights provides a "global script" of legitimacy for states in their international interactions.¹² Every state in the world has now signed up to at least one human rights treaty, most of which explicitly state that a state's adherence to the treaty can be open to some form of review by a human rights organisation.¹³

There is therefore, chapter one argues, an advantage for states to appear favourable to human rights and to seek membership of human rights organisations. This does not however, create an equivalent incentive towards compliance with that organisation. Opposition describes the process of states impeding the operation of an organisation's attempt to protect human rights. It can either come as a direct manifestation of non-compliance, such as refusing to implement a decision of an organisation, defying a ruling made against the state by an organisation's tribunal or, in some cases, a direct political attack on the legitimacy of the organisation. In some cases it can be pre-emptive - in that in the process of constructing an organisation states will seek to remove or limit the capacity of an organisation to enforce rights within a state. Cumulatively this behaviour is designed to eliminate future instances of opposition and make the organisation less likely to find against state parties in its decisions and less likely to criticise a state's human rights policy.

Institutional opposition is opposition based on arguments that the organisation is overstepping its legal powers and interfering in a state's sovereign decision making powers, as Lawrence Helfer terms it becoming "over-legalized".¹⁴ The dissemination of the norms of international human rights law has led to human rights organisations growing in importance and expanding the type of cases they examine. Jose Alvarez observed that the expansion of human rights regimes required the acceptance of "teleological interpretations" of organisation's charters leading to organisations expanding their remits beyond the scope

¹⁰ Allen Buchanan 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) 80.

¹¹ Lynn Dobson 'Legitimacy, institutional power and international human institutions: a conceptual enquiry' in Andreas Follesdal, Johann Schaffer and Geir Ulfstein *The Legitimacy of International Human Rights Regimes: Legal Political and Philosophical Perspectives* (CUP 2014).

¹² Jack Donnelly 'Human Rights: A New Standard of Civilization' (1998) 74 *International Affairs* 1,1.

¹³ Emile Hafner-Burton 'International Regimes for human rights' (2012) 15 *Annual Review of Political Science* 265

¹⁴ Laurence Helfer 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean backlash against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832, 1835.

“their creators intended.”¹⁵ The tension between the authority of a sovereign state and an autonomous organisation which attempts to exercise legal authority over a state’s laws can be notionally reconciled by the fact that states enter agreements agreeing to be legally bound by organisations. Yet, the expansionist tendency of human rights organisations makes the consent argument difficult to maintain. Institutional opposition occurs where the state symbolically reasserts its sovereignty by refusing to comply with a decision of an organisation on the basis that it represents an intrusion into its sovereign law making capacity. It is important to understand institutional opposition as a spectrum. At one end of the spectrum there is an on-going process of disagreement between a state and an organisation, in manner not entirely dissimilar from the way that a government may disagree with their domestic supreme court over the judicial review of their decisions. At the other end of the spectrum institutional opposition involves governments actively trying to abolish international human rights organisations.

The second type of opposition, ideological opposition, focuses less on the organisation’s legal capacity over sovereign states and more on the law that the organisation applies. It is built on an argument that the content of existing international human rights law represents a specific ideological programme which the state objects to. This indirectly attacks an organisation’s protection mandate, as it is an argument that the rights that the organisation enforces are in some way illegitimate. It requires a philosophical objection to the content of international human rights law, which forms the basis for criticising an organisation that is in the position of protecting those rights. The content of international human rights law reflects a process of political compromises as to both the type of rights protected and the relative normative hierarchy of those rights. Chapters one and two respectively analyse the origins of institutional and ideological opposition before going onto examine case studies of opposition towards an international organisation in chapter three and a regional organisation in chapter four. What both chapters one and two make clear is that postcolonial states often collectively engaged in acts of collective opposition that were motivated by anti-imperialism.

Defining Imperialism

Anti-imperialist opposition is institutional or ideological opposition underpinned respectively by either an anti-imperialist analysis of postcolonial states sovereign weakness or an anti-imperialist analysis of international law’s imperialist origins. Imperialism needs to be

¹⁵ Jose Alvarez ‘International Organizations: Then and Now’ (2006) AJIL 324,328.

distinguished from colonialism; the latter Michael Doyle argues refers to the practice of physically settling territories whereas the former refers to the practice of political dominance over another polity.¹⁶ Colonial-imperialism describes the process of imperial conquest of overseas territories in order to construct an empire that controls overseas territories from an imperial centre.¹⁷ The domination of territories from the colonial centre, whilst sometimes informal in nature, resulted in a system of economic and political control that created a power asymmetry between the coloniser and colonised.¹⁸ The colonial-imperialist process of permanently settling and formally demarcating European empires as a matter of international law began around the start of the eighteenth century. European colonial-imperialism began to decline in the mid-twentieth century due to a variety of different historical factors. The term postcolonial state, as used in this study, describes the states in Africa and Asia that emerged out of the legal process of decolonisation from 1945 onwards. Formerly colonialist states refers to those states that engaged in the practice of colonial-imperialism. What differentiated postcolonial states from other states, as Antony Anghie notes, was that they were created by international law – whereas other states had had the opportunity to create international law.¹⁹ Postcolonial states were created in a legal environment where there was a presumption that territories ought to become independent states although it wasn't until General Assembly Resolution 1514 in 1960 that colonial-imperialism was expressly prohibited in international law.²⁰

There were two types of imperialism that continued after the legal process of decolonisation in the 1960s. Residual imperialism is a form of imperial dominance contained within the framework of international law and it literally describes the remainder, or residue of colonial-imperialism found in the structure of international law. As formerly colonialist states created the legal template for many international organisations during the era of colonial-imperialism, international organisations had a residually imperialist structure. This allowed formerly colonialist states to preserve their dominant position at the UN and resist Third World initiatives designed to rectify the imbalances in international law that were detrimental to their own interests, such as the creation of a New International Economic Order that promoted wealth transfers from formerly colonialist states to postcolonial states. Neo-imperialism is different as it describes the use by Western powers of the language of legality

¹⁶ Michael Doyle *Empires* (Cornell University Press 1986) 30-34.

¹⁷ Ray Kiely *Rethinking Imperialism* (Palgrave Macmillan 2010) 45-90.

¹⁸ See John Tully *Public Philosophy in a New Key Volume 2, Imperialism Civic Freedom* (CUP 2008).

¹⁹ Anthony Anghie 'The Evolution of International law: Colonial and Postcolonial realities' from Richard Falk et. al (eds.) *International Law and the Third World: Reshaping Justice* (Routledge 2008)

²⁰ A/RES 1514 (XV) of 14 December 1960.

and rights as a justification for imperial force over weaker states. Anti-imperialism was a response to these two forms of imperialism and inferred that the dominance of formerly colonialist powers over the legal and economic structures of the international order was seen as proof that imperialism had continued after the legal process of decolonisation in the 1960s. Imperialism, and opposition to alleged forms of imperialism, remained important in international politics long after decolonisation and in the late 1990s and early 2000s the revival of different concepts of imperialism illustrated its continuing relevance as theme in international politics.²¹

Imperialism in this study means a form of external political dominance over the independence of a nation state in a way that undermines its sovereign capacity to decide its own laws. It can manifest itself in the two forms described above or be a reference to its colonial era form but external dominance is the key feature in all of its different manifestations. Central to anti-imperialist thinking was the idea of legal, political and economic dominance from an imperial centre over states in the periphery that had to be resisted in order to defend the sovereignty of postcolonial states. The three different forms of imperialism described above, describe both different eras of imperialism and different ways in which imperialism is manifested. Imperialism matters as an analytic tool in international law, not least because it can help understand some of the power dynamics that operate within it and can contribute to the marginalisation of individual states. John Hobson notes in his account of hierarchy in international relations theory that the legacy of colonial-imperialism helps explain the different “gradations of sovereignty” in international law.²² The distinction between imperial context and inherent imperialism, outlined at the beginning of this chapter, is important for assessing the source of imperialism. If the imperialism of a particular legal instrument is contextual then there is the possibility that it can be extracted from this context. If however the imperialism of a particular legal process is inherent then that legal instrument is predicated upon a form of imperial dominance which cannot be removed from its juridical form.

As R.P. Anand argues, the legal structure of international organisations reflected the assumed “monopoly” of formerly colonial states “to govern inter-state conduct” and collective

²¹ Kiley (n 17) 1-8.

²² John Hobson ‘The Twin Self-Delusions of IR: Why ‘Hierarchy’ and Not ‘Anarchy’ is the core concept of IR’ (2014) 42 Millennium Journal of International Studies 557, 561.

opposition from postcolonial states was often underpinned by anti-imperialism.²³ The UN was residually imperialist as at its formation in 1945 it preserved the colonial-imperialist power hierarchies between states and perpetuated the colonial era dominance of formerly colonialist states. Through its legal structure it reinforced the relative inequality of postcolonial states. In 1963 in order to maintain equal representation at the UN, in the wake of rapidly increasing membership - the largest wave of new entrants to the UN came between 1959 and 1962- a system of regional groupings was established. The system, which is still in existence today, divides UN members into five geographic blocs – African, Asian, Latin American and Caribbean, Eastern Europe and the Western European and Other bloc (a designation that includes North America). Members from these blocs would each get a proportion of voting positions on UN bodies and would often act collectively, voting along common ideological lines in the General Assembly. Postcolonial states mostly belonged to the African and Asian blocs and formerly colonialist states generally belonged to the Western European and Other bloc. From the early 1960s the African and Asian blocs, along with members of the Latin American and Caribbean bloc formed an issues based coalition known as the Third World bloc. Empirical studies on voting patterns at the General Assembly note that the areas where there were the strongest levels of cohesion between the different geographic blocs containing postcolonial states was over matters relating to independence from colonial rule and action against apartheid South Africa.²⁴ Carlos Rangel noted that, many of the countries included in the Third World bloc had “more divergences than similarities” but that “a lack of confidence ... within the world capitalist system” among Third World states meant they were inclined to accept “imperialism and dependence” was at the root of their problems.²⁵

Vijay Prashad described the Third World as “not a place” but “a project” which enabled postcolonial states to “[dream] of a new world.”²⁶ The behaviour of blocs in the General Assembly and at the UN Commission on Human Rights (later the Human Rights Council) can give an indication of the shared philosophy groups of states have on matters of international human rights law. The Third World bloc was the principal vehicle for postcolonial states to advance their interests in organisations that were residually imperialist in nature. As a consequence the Third World bloc’s collective votes and resolutions give an insight into the

²³ RP Anand ‘The Influence of History on the Literature of International Law’ in Ronald Macdonald and Douglas Johnson (eds.) *The Structure and Process of International Law* (Martinus Nijhoff, 1983) 342.

²⁴ Erik Voeten ‘Data and analysis of voting in the United Nations General Assembly’ in Implications’ in Bob Reinalda (eds) *Routledge Handbook of International Organisations* (Routledge 2012) 54-66.

²⁵ Carlos Rangel *Third World Ideology and Western Reality: Manufacturing Political Myth* (Transaction Books 1986) 43-5.

²⁶ Vijay Prashad *The Darker nations: A People's History of the Third World* (The New Press 2007) xv.

collective philosophy of postcolonial states towards international human rights law and the organisations designed to protect them. Even after the decline of the Third World bloc in the 1990s postcolonial states continued to group together collectively in the UN Human Rights Council and act in ways that reflected a shared ideological commitment on specific human rights matters. For matters of definitional clarity this study uses the term Third World bloc to describe the issues based coalition, consisting chiefly of postcolonial states, at the UN rather than other terms. After about 1995 the fragmentation of the Third World bloc's made alliances in international organisations a little harder to identify on strictly ideological lines, nevertheless the African and Asian regional groupings often worked together on acts of collective opposition. In chapters two and three it is shown how some of the anti-imperialist ideological opposition from the Third World bloc involved the promotion of reforms to international human rights law to create an alternate decolonised conception of human rights law.

Decolonised or decolonial thought is defined by Walter Mignolo as a way of thinking that "delinks" from existing epistemology and tries to find a "common ground or vision of the future."²⁷ The concept of the decolonial is not caught by same temporal constraints as the postcolonial, in that it does not define its theoretical approach with reference to the past, and instead seeks to construct a vision of the future which has definitively broken with colonialism. As chapter four argues the 1981 African Charter of Human and Peoples' Rights was a genuinely decolonial human rights instrument in that it broke with Western centric assumptions of human rights and was created by postcolonial African states, independently of residually imperialist international organisations. However, forms of anti-imperialist opposition continued against the African Commission and other bodies enforcing rights under the African Charter. The persistence of anti-imperialist opposition raises wider doubts as to whether it is possible to arrive at an enforceable decolonial system of international human rights law and demands a more rigorous consideration into the role of the legal structure of human rights organizations in generating anti-imperialist opposition.

Are supranational human rights organisations inherently imperialist?

Given that organisations with protection mandates have the legal capacity to protect human rights they should prioritise the constituent power of individuals within the state rather than

²⁷ Walter Mignolo 'Geopolitics of Sensing and Knowing: On De (Coloniality) Broader Thinking and Epistemic Disobedience' (2011) 14 Postcolonial Studies 273.

the constituted power of state governments. In a statement to the UN in 1980 Michel Foucault noted that state governments claim “to be concerned with the welfare of society [and] arrogate to themselves the right to pass off as profit or loss the human unhappiness of their decisions.”²⁸ States hold the power in international law to control and speak for individuals living under their authority, thus making it vital for human rights law to give them a voice. Protection mandates attempt to do this. Foucault’s argument was criticised by Jessica Whyte for implicitly supporting a broader right to intervene in sovereign states that would in turn serve to reinforce the importance of the state as the protector of biological life – something that Foucault had criticised extensively elsewhere.²⁹ This is however, a criticism of a particular application of Foucault’s argument and it can also be read as a call for international law to be aligned with the constituent power of individuals in states. RB Lillich, in a similar vein, argued that international law had not been fulfilling its “primary function” which was the “development of the human dignity of the individual.”³⁰

Whilst this brings human rights into tension with the concept of state sovereignty it gives those who William Simmons terms the “marginalised other” – individuals that are traditionally marginalised through the process of domestic law-making in states - a voice and protects some of their interests.³¹ It also notionally offers these individuals some protection in international law – a sphere traditionally dominated by the constituted powers of state governments. Hannah Arendt was highly critical of the concept of universal human rights in part because as an idea universal human rights failed to offer protection that could supersede the nation state.³² This is what a protection mandate, with its cluster of legal powers to enforce human rights in a sovereign state, attempts to do. Protection mandates however are the legal component of an international organization that specifically generates anti-imperialist opposition.

Direct accusations of imperialism by states are now relatively rare, but manifestations of anti-imperialist opposition are quite complex. The direct anti-imperialism of the Third World bloc in the 1970s was overt and attacked organizations for being engaged in a form of neo-

²⁸ Michel Foucault ‘Confronting Governments: Human Rights’ in James Faubion (ed) *Essential Works of Foucault 1954-1984 Vol 3: Power* (Robert Hurley tr. Penguin 1994) 474.

²⁹ Jessica Whyte ‘Human Rights Confronting Governments? Michel Foucault and the Right to Intervene’ in Matthew Stone, Illan rua Wall and Costas Douzinas (eds) *New Critical Legal Thinking: Law and the Political* (Routledge 2012).

³⁰ RB Lillich “Sovereignty and Humanity: Can they Converge?” quoted in Louis Henkin et al. *International Law: Cases and Materials* (St Paul West Publishing 1993) 19.

³¹ William Simmons *Human Rights Law and the Marginalized Other* (CUP 2011) 2.

³² Hannah Arendt *The Origins of Totalitarianism* (Harvest Books 1976) 291-3.

colonialism and ignoring their concerns about apartheid and underdevelopment. However, since the early 2000s pre-emptive opposition, where states create human rights regimes with intentionally weak or non-existent protection mandates, has become the dominant mode of anti-imperialist opposition. Anti-imperialist opposition also involved states mobilising other states from the Third World bloc to defend them in international human rights organisations. One case raised in both chapters three and four is Sudan, which was successful at opposing attempts by the UN Human Rights Commission, the UN Human Rights Council and the African Commission, to investigate its human rights abuses. It was able to do this by rallying the Third World bloc (latterly the African and Asian blocs) in international organisations, to its defence. The imperialism of an organisation is not an esoteric question – in a world where colonial-imperialism created meaningful inequalities between states the imperial context of international law facilitates the perpetuation of some of these inequalities. Regardless of whether one believes in the political importance of imperialism or an anti-imperialist analysis of international society - understanding both the context and inherent nature of imperialism within the legal structure of human rights organisations can help explain why they are prone to dysfunction and fail in their stated purpose of protecting human rights.

Anti-imperialist politics towards supranational human rights organisations, of which anti-imperialist opposition is a manifestation, is only possible because protection mandates utilise a juridical construction of a state that is non-compliant with international human rights law. This is inimical to whole idea of human rights which, as Alain Badiou argues, requires a common “consensus regarding what is barbarism” to construct an “evil” against which the universal “good” of human rights can be defined.³³ The existence of a human rights abusing state is the “evil” needed to define human rights. By juridically inferring the existence of what Jacques Derrida described as a rogue or outlaw state, which does not comply with international human rights law, a protection mandate legitimises an international organisation’s attempts to compel all its member states to comply with international human rights law.³⁴ The existence of a human rights abusing state is therefore a necessary feature of a protection mandate as it legitimises the juridical potential of a protection mandate and allows an organisation to make a normative claim about the content of a state’s laws.

It is easy to frame this process as another form of imperialism by a system of law that was already marginalising postcolonial states. This had the effect of putting the defence of that

³³ Alain Badiou *Ethics: An Essay on the Understanding of Evil* (Verso 2012) 8.

³⁴ Jacques Derrida *Rogues: Two Essays on Reason* (Pasacle- Brault tr. Stanford University Press 2005) 78-85.

state by the Third World bloc, and concomitant attacks on the organisation, into an anti-imperialist context. Some international organisations have the power to enforce human rights by the exercise of some coercive function over the state, such as the imposition of sanctions, but most human rights organisations do not have any direct legal powers of coercion. Absent a legal framework that gives an organisation the legal powers to directly coerce states into compliance, an organisation needs to rely upon harnessing the political forces to mobilise state compliance. This involves trying to create a sense of stigma around a state for non-compliance with human rights law or, shame a state for its lack of compliance. As chapter five argues, this has a direct effect upon a state's external claim to sovereignty.³⁵ During the process of colonial-imperialism the expansion of empires created what Carl Schmitt termed the *nomos* of colonialism, a public international order that divided the globe into civilized and uncivilized territories.³⁶ In a similar fashion a protection mandate implicitly envisages dividing its member states into categories of human rights violating and human rights compliant states. A protection mandate also specifies how a state can move states from the category of human rights violating states to the category of human rights compliant states by prescribing to states the changes that they need to make to their laws to become human rights compliant. The organisation is thus able to utilise their ability to potentially delegitimise a state's external sovereignty as leverage over a state in order to change their laws.

A protection mandate is predicated on an imperialist relationship of dominance as it envisages a source of law external to the state having the right to determine the validity of a state's domestic laws. This framework of dominance exists outside of the residual-imperialist context of international law, in that regardless of whether the organisation is regional or international a protection mandate requires an organisation to legally dominate a state by attempting to indirectly coerce human rights compliance. Whilst this process can be unsuccessful - and the high prevalence of instances of opposition in many organisations indicates that it often is - the fact that the legal structure of an organisation attempts to do this is what generates anti-imperialist opposition. In some organisations, chapter five argues, this process is considered legitimate by the organisation's member states because, whilst the operation of the organisations protection mandate is inherently imperialist, this can be seen as necessary for the pursuit of shared organisational goals. For example the European Court of Human Rights relies upon states viewing its powers to judicially review their domestic legislation for

³⁵ On the concept of external sovereignty see; Stephen Krasner *Sovereignty: An Organised Hypocrisy* (Princeton 1995) 24.

³⁶ Carl Schmitt *The Nomos of the Earth: The International Law of the Jus Publicum Europaeum* (GL Ulmen tr. Telos Press Publishing 2006) 67-9.

compliance with the European Convention on Human Rights (ECHR) as being necessary for the continued promotion of democracy in the region. This is a shared interest among many state parties to the ECHR and dates back to their collective experience at the time of the ECHR's drafting during the cold war. Crucially what a collective shared interest of this nature does is allow the organisation to function in spite of the inherent imperialism of its legal structure but as chapter five concludes this process is not readily adaptable to all human rights organisations.

The structure of this study

The basic thesis of this study is that the structure that allows a supranational human rights organisation to protect human rights in a sovereign state is inherently imperialist. This explains the persistence of anti-imperialist opposition. Critics, such as Balakrishnan Rajagopal and Antony Anghie, have often neglected institutional theory in their analysis of international law's imperialism.³⁷ Whilst their works provide a thorough account of the imperialist context of international law's creation and its appropriation by neo-imperialism there has been little consideration of the law of international organisations and whether the legal mechanisms of organisations are themselves imperialist. Equally organisational scholarship in international relations and international law has often considered instances of anti-imperialist opposition through the prism of legal compliance and the political forces that motivate non-compliance.³⁸ The nature of the processes envisaged in the text of the legal instruments underpinning supranational organisations has received little attention. Laurence Helfer's work on the legalisation of tribunals and Johan Schafer's work on legitimacy has analysed whether the legal structure of organisations themselves may be at the root of opposition but neither directly considered the role of imperialism in shaping opposition.³⁹

In part this is due to a general lack of theorisation of the causes of different types of opposition. The first two chapters of this study provide a theoretical framework for understanding opposition to supranational organisations, and the subset of opposition that is anti-imperialist opposition. The next two chapters critically consider how anti-imperialist opposition functioned before the final chapter specifically analyses the legal structure of protection mandates to show how they are inherently imperialist. This study takes the rational

³⁷ Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (CUP 2007). Balakrishnan Rajagopal *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2004).

³⁸ For examples see (n 2).

³⁹ Helfer (n 14) Johan Schafer et al 'International human rights and the challenge of legitimacy' from Schaffer et al (eds.) (n 11).

design theory of organisations, which maintains that states shape organisational power to achieve specific aims and ends, as its starting point and demonstrates that the construction of human rights organisations, with the stated aim of protecting rights in states, relies of an inherently imperialist juridical framework.⁴⁰ This study also utilises some of the work of the Third World Approaches to International Law (TWAIL) movement, on the reform of international human rights law, but draws a distinction between the theoretical project of analysing the imperial origins of international law and the state practice of anti-imperialist opposition.⁴¹

The first chapter outlines a general theory of the causes of institutional opposition. Institutional opposition is common to all states in human rights organisations as protection mandates are in tension with conventional notions of sovereignty in international law. In particular the capacity of an organisation to make decisions over the validity of domestic laws, as part of the process of assessing their compliance with international human rights law, allows them to make what can amount to a rival claim of sovereign authority. Institutional opposition is where states engage in an act of opposition – such as non-compliance, or making a political attack on an organisation – justifying it as a defence of their sovereignty. Anti-imperialist institutional opposition was institutional opposition inspired by the notion that the sovereignty of postcolonial states was weaker than other states and was therefore exceptionally vulnerable to outside interference. Chapter two analyses the foundations of ideological opposition and argues that anti-imperialist ideological opposition was either focused on the ideological reprioritisation of the content of human rights law or on opposing human rights being a justification for neo-imperialist policies. There were three specific types of anti-imperialist ideological opposition, each of which is explored with reference to a specific case study. Anti-hegemonic resistance opposed human rights organisations because of the association of human rights with neo-imperialism. Attacks by African states on the International Criminal Court (ICC) demonstrate how this form of ideological opposition did not propose an alternate conception of international human rights law but served as vehicle for protecting heads of state from prosecution at the ICC. The other two instances of ideological opposition, developmentalism and cultural relativism, were part of a broader campaign to reprioritise the content of international law to meet the needs of postcolonial states. These

⁴⁰ For an overview of rational design theories see Barbara Koremenos et al. The Rational Design of International Institutions in Barbra Koremenos, Charles Lipson and Duncan Snidal (eds.) *The Rational Design of International* (CUP 2004) 4-6.

⁴¹ Makau Mutua and Antony Anghie 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31.

two instances of ideological opposition are examined by looking at the campaign for a right to development in international law and the Asian values debate in the 1990s.

Defending sovereignty, as a form of collective anti-imperialist institutional opposition, was central to the Third World bloc's opposition at the UN Commission on Human Rights and as chapter three argues there was only a limited attempt to engage in anti-imperialist ideological opposition aimed at the reprioritisation international human rights law. Opposition as a form of counter-hegemonic strategy against Western imperialism resulted in the Third World bloc adopting extreme double standards on human rights as it defended postcolonial regimes, even when they were engaged in wide scale human rights violations. Chapter four shall argue that the 1981 African Charter of Human and Peoples' Rights represented a definitive ideological reprioritisation of the content of international human rights law to reflect the needs of postcolonial states. This was the literal realisation, albeit on a regional rather than international scale, of some of the Third World bloc's anti-imperialist ideological opposition detailed in chapter two. In spite of this, there was continued anti-imperialist opposition from some states to the work of the African Commission. These forms of opposition also appeared in other bodies that applied the African Charter such as the African Court of Human and Peoples Rights and sub-regional tribunals. This study is highly sceptical of some of the claims made by states engaging in anti-imperialist opposition and follows on from the work of Roland Burke and Daniel Whelan, arguing that anti-imperialist opposition was often far more focused on the protection of sovereignty from supranational organisations than advancing an alternate conception of human rights.⁴² In both chapters three and four it is shown that anti-imperialist opposition is specifically triggered by an organisation's protection mandate by either by its development triggering pre-emptive anti-imperialist opposition or by its exercise leading to direct anti-imperialist opposition.

Chapter five argues that what makes anti-imperialist opposition inevitable, even in organisations formed outside of the residual-imperialist frameworks of international law, is the structure of protection mandates. Their inherently imperialist legal structure helps explain why even organisations that utilise decolonial human rights instruments, which seemingly rectify the imperial context of international human rights law, still face forms of anti-imperialist opposition. This chapter draws upon postcolonial theory to show how protection mandates construct an alterity, in the form of a rights abusing state, to define the universality of the

⁴² Roland Burke *Decolonization and the Evolution of International Law* (University of Pennsylvania Press 2009). Daniel Whelan *Inadvisable Human Rights: A History* (University of Pennsylvania Press, 2010).

rights they seek to protect. Understanding inherent imperialism also helps explain why organisations with intentionally weak protection mandates are created, as states seek to balance a desire to conform to the global script of legitimacy by belonging to a human rights organisation with sovereign vulnerabilities and a dearth of incentives to comply with human rights law. This study aims to give a concrete theory of how the legal structure of an organisation can give rise to opposition and how imperialism figures within that process.

CHAPTER ONE

Understanding Institutional Opposition to Human Rights Organisations

Introduction

All human rights organisations with a protection mandate have one key element in common: they all make an explicit or implicit claim to authority over the content of a sovereign state's laws and state practice regarding the protection of human rights. This chapter analyses the concept and origins of institutional opposition, arguing that the juridical inequalities of postcolonial states explain how anti-imperialism came to underpin postcolonial states' collective institutional opposition to international organisations. Anti-imperialism, as the term is used in this study, describes the resistance of postcolonial states to the perceived and actual imperialist nature of the international political and economic system and their marginalisation at the hands of international institutions. A state's opposition to a supranational human rights organisation can include both legal non-compliance with that organisation and also political protests at the organisation's perceived and actual powers. As outlined in the introductory chapter, there are two forms of opposition to a human rights organisation: institutional opposition, which disputes the powers of organisations and the effects they have on state sovereignty; and ideological opposition, where there is a philosophical attack on the content of the human rights law the organisation enforces. Institutional opposition is fundamentally a dispute about the power that an organisation has over a sovereign state through its protection mandate – the collective term for describing the legal powers of an organisation to realise international human rights law within the nation state.

A state that becomes a member of an organisation with a protection mandate is required to accept a set of legal obligations, which differ in nature according to the type of organisation, but all involve potentially making changes to a state's domestic law. Therefore a human rights organisation with a protection mandate, by claiming to protect individuals within states, has the potential to pose as an alternate legal authority to that state. In so doing the organisation is claiming ipseity – what Jacques Derrida defined as the legitimate power of a sovereign to give “itself its own law ...its own force of law.”¹ This creates a tension between the authority of

¹ Jacques Derrida, *Rouges: Two Essays on Reason* (Pascale-Anne Brault and Michael Nass tr. Stanford University Press, 2005) 11.

the sovereign state and the authority of the organisation, which can manifest itself in institutional opposition. This can be an act of legal non-compliance or a political act, such as leaving the organisation, which is justified as a defence of sovereignty. This is direct institutional opposition. Or, the organisation can have its legal structure pre-emptively shaped by state parties so as to weaken its protection mandate - this is pre-emptive opposition.

In the first section of this chapter, the concept of state sovereignty and the membership of international human rights organisations are explored. There are a variety of incentives and theories as to why states become members of human rights organisations, however these theories do not necessarily extend to the operation of protection mandates which, as the second section argues, give the organisation a claim to sovereign-like authority that generates institutional opposition. The third section of this chapter examines this process in relation to collective institutional opposition from postcolonial states, arguing that the imperialist context of international law's creation led to juridical inequalities between postcolonial and formerly colonialist states and is responsible for anti-imperialist institutional opposition. This is a specific form of institutional opposition, which often makes more extreme claims; taking the view that because of juridical inequalities, postcolonial states' sovereignty is more vulnerable and international human rights organisations should focus on colonialism and colonial human rights abuses. Anti-imperialist institutional opposition is not the only extreme form of institutional opposition. American exceptionalist forms of institutional opposition, discussed in the second section, argue that the United States should be exempt from any form supranational scrutiny of their human rights record because of the exceptional democratic nature of the US constitutional system. In subsequent chapters it is shown how anti-imperialist institutional opposition has persisted in regional organisations created outside of the imperialist context of international law. This, as the final chapter argues, is caused by the legal structure of protection mandates; regardless of the context of their operation, they involve enhancing the power of an organisation over a sovereign state. This makes it impossible for the protection of international human rights law, through a supranational organisation, to ever be truly decolonised.

(1) Sovereignty and the question of why states join human rights organisations?

Louis Henkin's description of sovereignty as "a mistake built upon mistakes" captures the way that the concept of sovereignty has often been seen as a bar to the protection of human

rights.² Sovereignty has, Henkin argues elsewhere, a dark history because states accept human rights obligations “if they wish to” and otherwise cite the protection of their sovereignty as a justification for non-compliance.³ This is the conventional view of the obstacle that sovereignty poses to membership of a human rights organisation. HLA Hart’s classic definition of the “sovereign state” as one “not subject to certain types of control” and capable of conducting itself in an “autonomous” manner is difficult to reconcile with the idea of supranational human rights scrutiny which seemingly diminishes the capacity of a state to act with complete autonomy.⁴ Yet recently, scholars such as Brad Roth have argued that whilst human rights and sovereignty are distinct concepts, they are both in a mutually important relationship.⁵ Hart’s approach to the question of sovereignty would make membership of a human rights organisation with a protection mandate principally problematic, if not impossible; whereas Roth’s approach would see membership of such an organisation as a logical extension of a state’s operation in the international sphere.

To understand institutional opposition it is necessary to unpack the meaning of sovereignty. This section does this in three parts; firstly the nature of sovereignty and its different legal meanings will be analysed before looking at how this relates to the different forms of organisational protection mandate. As the second part of this section outlines the legal doctrines underpinning organisational membership give an insufficient explanation of that organisations legitimacy. Legitimacy in this context means the recognition and acceptance of the organisation’s powers as evidenced by broad compliance with its decisions. This form of legitimacy can be either content dependent (where the organisation is assessed on the outcomes it produces) or content independent (where the organisation is considered legitimate regardless of the outcomes it produces). This is a conflation of both a descriptive and normative account of legitimacy, but this is important as this captures how a state may view an organisation as being a legitimate source of legal authority.⁶ The third part of this section addresses the question about why a state may choose to join an international human rights organisation. There are complex overlapping web of incentives that explain why a state might join an international human rights organisation but crucially these incentives do not

² Louis Henkin, ‘Human Rights and State "Sovereignty"' (1995) 25 GA Journal of International and Comparative Law 31, 31

³ Henkin ‘That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera’ (1999) 68 Fordham Law Review 1, 6

⁴ HLA Hart, *The Concept of Law* (Hart Publishing 1961 ed.) 217

⁵ Brad Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (OUP 2011) 4

⁶ Daniel Bodansky Legitimacy in International Law and International Relations’ from Jeffery Dunoff and Mark Pollack *Interdisciplinary Perspectives of International Law and International Relations: The State of the Art* (CUP 2013).

necessarily explain why, having joined a state would recognise that organisations broader legitimate authority and then comply with that organisation. This can be termed an ‘incentive to commit but not comply’ and it is this as the second section goes on to argue which generates institutional opposition.

(i) *Domestic Legal sovereignty and the act of joining an international organisation*

Steven Krasner argues there are at least four different meanings of the word sovereignty: domestic (authority over law within a state); interdependent (the authority to control trans-border movements); international legal sovereignty (recognition by other states); and Westphalian sovereignty (the ability to exclude external forces).⁷ Westphalian sovereignty – named after the Peace of Westphalia in 1648 that ended the Thirty Years War – is chiefly characterised by the capacity of a sovereign to exercise control over their territory to the exclusion of all other forms of power, and was the default form of sovereignty in international law during its evolution and for much of its history. Samuel Pufendorf’s 1672 theory of sovereignty outlined in the book *Of the Law of Nature and Nations* was the first to utilise the language of international law to define sovereignty and in Pufendorf’s work, individual sovereigns were the supreme lawmakers in the territory under their control.⁸ In the *Island of Palmas Case*, the Permanent Court of Arbitration defined sovereignty as the “right to exercise therein, to exclusion of any other State the functions of a State”; essentially endorsing Westphalian sovereignty as the founding definition of sovereignty in international law.⁹

A crucial component of Westphalian sovereignty is the protection of what Krasner terms domestic and interdependent sovereignty, as both of these are to an extent dependent on the ability to exclude outside sources of power. Domestic legal sovereignty is understood, Michael Oakshott argues, in terms of the authority over the law by the single unified figure of the sovereign.¹⁰ The sixteenth century philosopher Jean Bodin, widely considered one of the founding fathers of the modern doctrine of sovereignty, defines sovereignty as the “absolute and perpetual power” exercised by a sovereign that is “not subject to the law” – which would include laws passed by other sovereigns.¹¹ Richard Joyce notes that a crucial component of Bodin’s conception of sovereignty is that the “sovereign [must] hold absolute determining power over the law.”¹² This puts the sovereign over or above the law, and other conceptions

⁷ Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 12.

⁸ Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2011) ch 11.

⁹ *Island of Palmas Case*, Perm Ct Arb 1928, 2 UN Rep Intl. Arb Awards 829, 8.

¹⁰ Michael Oakshott, ‘The Vocabulary of the Modern European State’ (1975) 23 Political Studies 391.

¹¹ Jean Bodin, *On Sovereignty* (J Franklin ed. CUP 1992) 1, 11-12.

¹² Richard Joyce, *Competing Sovereignties* (Routledge 2013) 63-4.

of sovereignty have similar starting point. Carl Schmitt's definition of sovereignty that "he who is the sovereign decides the state of exception" presents the possession of sovereignty as control over the law and its creation.¹³ Schmitt's conception of sovereignty was positivist, in that he envisaged the sovereign being the originator and determiner of the law. As Neil MacCormick notes, sovereign absolutism over the law was the founding principle of the "political theory" of interstate relations and traces its origins to Bodin and Thomas Hobbes.¹⁴ Wendy Brown argues that the ideas of Bodin, Hobbes and Schmitt collectively form the "composite figure" of modern sovereignty, which has as its core tenants supremacy, perpetuity over time and the seemingly boundless capacity of decision-making.¹⁵

The conventional assumption in international law is that entry into an international agreement that constricts a state's future actions is a sign of that state's sovereign capacity. In the *SS Wimbledon*, the International Court of Justice (ICJ) outlined this position, ruling that entering into legal agreements that constrained a state's future actions is an essential "attribute of state sovereignty."¹⁶ This would mean that an organisation has as much power as states are prepared to confer upon it. Functionalist theories of international organisations, (which focus on the organisation's stated purpose as the basis for analysing their powers), and realist theories of international relations, (which views states as essentially self-interested actors), both support the notion of conferral of powers in relation to international organisations.¹⁷ The idea of conferral or consent maintains that international organisations have legitimate authority over states because they consent to a legal transfer of some of their sovereign powers to the organisation and that such a process is an attribute of sovereignty.¹⁸ Jaanika Erne argues that the process conferring power is what underpins the legitimacy of an international organisation's authority over the state.¹⁹ Jean-Marc Coicaud argues that it is useful to view the act of becoming a member of an international organisation as a transaction, as it makes it clear that a "commitment to play by the rules" exists for all parties, creating

¹³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George. Schwab tr University of Chicago Press 2005) 5.

¹⁴ Neill MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999) 124.

¹⁵ Wendy Brown, *Walled States, Waning Sovereignty* (MIT Press 2010) 22.

¹⁶ *Case of the SS Wimbledon* (PCIJ, Ser A, No 1, 1923)

¹⁷ For an overview of both of these positions See respectively Ernest Hass *Beyond the Nation State: Functionalism and International Organization* (ECPR Press 2008) 33-35. John Mearsheimer, 'The false promise of international institutions.' (1994) 19 *International Security* 5. For a summary of the doctrine of conferral see Dan Soorshi 'Some Preliminary Remarks on the Conferral by States of Powers on International Organisations' (2003 Jean Monet Working Paper 04/03 available at <http://www.jeanmonetprogram.org/archive/papers/03/030401.pdf> p. 10-19.

¹⁸ See Thomas Franck, 'Legitimacy in the International System' (1988) 82 *AJIL* 705.

¹⁹ Jaanika Erne, 'Conferral of Powers by States as a Basis of Obligation of International Organisations' (2009) 78 *Nordic Journal of International Law* 177.

certainty in international relations.²⁰ However, the nature and scope of agreements after World War One, in particular the multilateral agreements that created standalone international organisations, significantly altered the effect that international agreements would have on conventional notions of sovereignty.²¹ Certainly, after 1945 the institutions of international organisations began to acquire legal personality and the capacity to act autonomously from member states. This created a potential conflict between the international legal authority of the organisation

The core tension between sovereignty and the membership of international organisations, as James Crawford summarises, is that the basic definition of sovereignty within international law remained unchanged whilst international agreements evolved.²² However, this need not be a problem, as there are numerous different examples of states seemingly reconciling this tension when joining international organisations. Karen Alter argues that where there are obvious reasons for state coordination in a particular field, such as international trade or economic integration, these lead states to cooperate with an organisation's tribunal even when it makes judgements that directly conflict with their interests.²³ Additionally, scholars note that there is a tendency for states to join organisations out of a desire to lock-in certain policy benefits, such as democratisation or economic harmonisation.²⁴ Finally, in terms of dispute resolution, there is often a desire to adopt models of strong dispute resolution mechanisms that seemingly undermine the notion of delegated powers. As Alter argues in her study on international courts (in Helfer's terminology, judicial review or interpretative bodies), compliance is often compatible with notions of sovereignty as states can see broader interests in compliance with an organisation or in delegating particular decisions to the organisation.²⁵ This be described as the reconciled interest school of thought - whilst this does not entail full agreement with an international organisation's every decision, it is nevertheless possible to reconcile the competing tensions in the doctrine of sovereignty created by organisational membership.

²⁰ Jean-Marc Coicaud, 'Deconstructing International Legitimacy' in (eds.) Hilary Charlesworth and Jean-Marc Coicaud, *Fault Lines of International Legitimacy* (CUP 2010) 33.

²¹ Some scholars see a distinct shift in the understanding of sovereignty in international law between international law before and after 1945. See Kate Parlett, *The Individual in the International Legal System: Continuity and Change* (CUP 2011) 338-9

²² James Crawford, 'Sovereignty as a legal value' in James Crawford and Martti Koskeniemi (eds.) *The Cambridge Companion to International Law* (CUP 2012).

²³ Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton 2013) 60-5.

²⁴ Peter Rosendorff and Helen Miller, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape' (2001) 55 *International Organisation* 829; Martha Finnemore and Stephen Toope, 'Alternative Views to 'Legalization': Richer Views of Law and Politics' (2001) 55 *International Organization* 743.

²⁵ Alter (n.23) 65.

(ii) *Differentiating International Human Rights Organisations by their legal powers*

When examining the case of human rights organisations specifically, doctrine of conferral of powers and reconciled interests are insufficient to abridge the tension between sovereignty and the authority of international organisations. The ICJ's statement in the *WHO Advisory Opinion* that an organization's power comes from the powers "express statement in [an organization's] constituent instrument" captures the principle of how powers are conferred but this poses broader problems for justifying how conferred powers are applied or may evolve.²⁶ This creates a broader problem as the failure to reconcile this tension results in the organisation lacking legitimate authority when exercising its protection mandate. To fully unpack this problem it is necessary to first address the role of different forms of protection mandates and the legal obligations they attempt to impose upon states, before examining the issue of legitimacy more generally. Lawrence Helfer's work identifies three types of human rights organisations, based on the relative legal power of their protection mandates. In descending order of power, these are: judicial review-type organisations, treaty review bodies and political bodies. Whilst not exhaustive this nevertheless provides a useful template for understanding the relative claim to power of different organisations.

Judicial review-type organisations, such as the European Court of Human Rights (ECtHR), have the power to hear cases from individuals within a member state's jurisdiction complaining of human rights abuses. They have partial powers of legislative scrutiny entrusted to them, and in some cases, their power is locked into domestic constitutional law. Helfer and Ann-Marie Slaughter note that the judicial review model has had the greatest success in achieving state compliance with human rights treaties.²⁷ The legal obligation to comply with these organisations is both contained in the Treaties that found them. Judicial review organisations in many cases attempt to impose what Başak Çalı describes as strong duties upon states that clearly define the role of state discretion in the protection of human rights.²⁸ The idea of conferral as the justification for these legal obligations is particularly problematic in the case of these organisations. Jose Alvarez describes this as "deceptive", as it fails to acknowledge the development of international institutional law and the capacity of intra-organisational

²⁶ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, (1996), para.25. See also Soorshi (n 17) 20-25.

²⁷ Laurence Helfer and Ann-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *The Yale Law Journal* 273

²⁸ Başak Çalı 'The Disciplinary Account of the Authority of International Law: Does It Stand Firm against Its External Critics?' (2016) 15 *ESIL Reflections* 1, 7.

practice to gain legal status.²⁹ This is further complicated, Mattias Kumm observes, when international tribunals review domestic legislation to assess state compliance with international law or interpret treaties in an expansive manner, as they are effectively creating fresh legal obligations without explicit state consent.³⁰

Interpretive bodies, or treaty review bodies such as the UN Human Rights Committee (HRC – the International Covenant on Civil and Political Rights (ICCPR) treaty review body), are bodies that have the power to review a state's record of compliance with a human rights treaty and rule on interpretations of that treaty.³¹ These bodies don't always have the power to hear individual petitions but do have the power to review states human rights records in other ways, such as by reviewing annual reports.³² There are nine bodies of this nature, seven of which have the power to accept individual petitions. Four of these are active or have a significant caseload – alongside the HRC, there is the Committee Against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination Against Women Committee (the CEDAW Committee). Treaty bodies, Çalı and Wyss argue, gain their legal and moral authority from normative power of their parent treaty as the public acceptance by a state of obligations under a treaty means that states establish a relationship of accountability that means they should not become the “arbiter” of their “own performance” in regards to “human rights protection.”³³ This means that the power of treaty bodies is bound up in the treaty that they are interpreting. In General Comment 33, the HRC specifically describes its decisions as “views”, and makes it clear that states have an obligation “to respect in good faith” its decisions, echoing the general language of treaty interpretation.³⁴ This means that when treaty bodies issue interpretations of the treaty that may be described as dynamic or expansive states may object arguing that this was beyond the scope of their original act of conferral of powers. Additionally as Oona Hathaway observes, consent from states to treaties is often subject to “time-inconsistent-preferences”

²⁹ Jose Alvarez, *International Organizations as Law-makers* (OUP 2005) 81

³⁰ Mattias Kumm, ‘The legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 907, 914.

³¹ See Çalı, ‘The Legitimacy of international interpretative authorities for human rights treaties: an indirect instrumentalist defence’ from Andreas Føllesdal and others (eds) *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2014) 143

³² The division between these categories is not absolute. As Helfer and Slaughter note, some organisations in the scrutiny category, such as the UN Human Rights Commission, also try to imitate the judicial review model, see (n 1) 343-365

³³ Çalı and Alice Wyss ‘Authority of International Institutions: The Case for International Human Rights Treaty Bodies’ (2008) UCL Working Paper 29, 4-5.

³⁴ CCPR/C/GC/33 5 November 2008 para 19

and different factions within states may be prone to question previous acts of consent made on their behalf.³⁵

Political bodies, such as the Commonwealth of Nations, have no express legal powers to review a state's human rights record, but as international actors, they can generate compliance with the standards of international human rights law by the application of political pressure.³⁶ This can be achieved through membership criteria by, for example, suspending states who fail to comply with human rights norms from the organisation; by functional criteria, such as making a state's receipt of organisational services (i.e. development aid) conditional upon adherence to human rights norms; or by exhortatory powers such as publically censuring or condemning states.³⁷ Whilst these organisations do not generate formal legal obligations as Armin von Bogdandy et al. argue research on patterns of global government has quite convincingly demonstrated that devices such as ranking and condemnation is important in generating public legal authority in an organisation.³⁸ Seen through the context of what Andrew Hurrell terms "coercive socialisation" – where a range of overlapping political and material incentives in the international sphere push states toward particular courses of action – the exhortatory powers of political organisations can have a distinct effect upon states.³⁹ Therefore even if there is not a direct legal obligation for a state to comply with political organisations, there is an incentive to comply with these organisations which mimics or shadows a legal obligation.

What links all of these organisations is that they all make some sort of claim to possess the legitimate authority to order a state to alter its domestic laws and practices in order to protect human rights within that state and base this authoritative claim within the context of a state's legal obligation. Yet, as a number of scholars have noted, the existence of a legal obligation is insufficient to automatically grant that organisation legitimate authority to enter into a form of judgment in connection with a state's lawmaking functions.⁴⁰ Some such as Jutta Brunnée

³⁵ Onna Hathaway, 'International Delegation and State Sovereignty' (2007) 71 *Law and Contemporary Problems* 115, 128

³⁶ Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2010)

³⁷ The IMF is an example of an organisation using this form of human rights conditionality: Balakrishnan Rajagopal, 'Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights' (1993) 11 *Buffalo International Law Journal* 85.

³⁸ Armin Von Bogdandy, Philipp Dann, and Matthias Goldmann. 'Developing the publicness of public international law: towards a legal framework for global governance activities' from Von Bogdandy (eds.) *The Exercise of Public Authority by International Institutions*. (Springer 2010).

³⁹ Andrew Hurrell "Power, Institutions and the Production of Inequality" in Michael Barnett and Raymond Duvall *Power in Global Governance* (CUP 4thed. 2008) 53.

⁴⁰ See Allen Buchanan, 'The Legitimacy of International Law' in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (OUP 2010)

and Stephen Toope, have argued that legal obligations should be understood in the context of legal practices and norms that through interrelated interactions between states create obligations upon them.⁴¹ This line of argument sees legitimacy constructed within a socialized template and the concept of sovereignty in as a broadly relational process.⁴² A further argument advanced by Patrick Macklem is that international law “sorts claims of economic and political power” and therefore the legitimacy of a human rights organisation is inherent to the structure of international law which validates the “international distribution of sovereign powers”.⁴³ Again this theory is dependent on a particular interpretation of the nature of sovereignty, which whilst not without merit, tells us relatively little about why states might consider the organisation legitimate and therefore be inclined to comply with the organisation. To understand this perspective, and thus construct a more detailed picture of an organisation’s claim to legitimacy, it is important to look at the international relations literature which evaluates why states join international organisations.

(iii) *Why do states join international organisations*

It is important at this point to distinguish human rights organisations, formed solely for the purpose of protecting human rights from supranational organisations, formed for another purpose, that also have a protection mandate. For example some international organisations that exist to promote economic co-operation or trade also have a protection mandate. Giovanni Molano-Cruz in a study of the Court of Justice of Andean Community Notes that the Court’s jurisdiction to hear human rights cases stems from the first article of Cartagena Agreement which states that members of the community aim to bring “about an enduring improvement of the standard of living” of people living in member states.⁴⁴ These organisations need to be distinguished from organisations that exist purely to promote human rights as they do not generate direct economic benefits to states. The protection mandates of human rights organisations confer benefits upon individuals not states generating what Simmons terms the inverse legitimacy conundrum.⁴⁵ Realist theorists of international relations have attempted to look for more tangible motivations as to why states enter into human rights organisations, such as membership of an organisation being linked to preferential trade

⁴¹ Jutta Brunnée and Stephen Toope ‘Interactional International Law and the Practice of Legality’ from Emmanuel Adler and Vincent Pouliot *International Practices* (CUP 2009).

⁴² See Coicaud ‘The Evolution of International Order and Fault Lines of International Legitimacy’ from Charlesworth Coicaud *Fault Lines of International Legitimacy* (CUP 2010).

⁴³ Patrick Macklem *The Sovereignty of Human Rights* (OUP 2015) 50.

⁴⁴ Giovanni Molano Cruz ‘Addressing Human Rights in the Court of Justice of the Andean Community and the Tribunal of the Southern African de (2014) 81 *Colombia Internacional* 99, 109.

⁴⁵ Beth Simmons *Mobilizing for Human Rights International Law in Domestic Politics* (Cup 2009) 126

benefits, but there is relatively little empirical evidence that material incentives play a role in encouraging state membership.⁴⁶ Realist theories have a better set of explanations about why organisations which were formed for a purpose other than protecting human rights, can protect human rights, as human rights can become part of the transactional bargaining process for negotiating future gains.⁴⁷ However, these explanations do not necessarily apply to the membership of organisations that are purely designed to protect human rights. The analysis of organisational membership of organisations that protect human rights can be separated into three broad strands.

Firstly there is the persuasion model is common among ideational theorists of international relations, who argue that membership of international human rights organisation represents the “convergence of national preferences” created by domestic political pressures.⁴⁸ However, it is noteworthy that this scholarship is highly Eurocentric in its selection of examples and evidence, and whilst potentially providing a persuasive case as to why states become members of the European Convention on Human Rights (ECHR), it does not necessarily translate to into a wider context – something that chapter five explores further. Secondly there is the external legitimacy argument which maintains that states join organisations as a part of gaining recognition as legitimate actors from other states. Sovereign states are recognised as legitimately sovereign when other sovereigns give them mutual recognition, as Michael Fowler and Julie Bunck put it, “a ticket of general admission to the international arena.”⁴⁹ Jack Donnelly encapsulating this argument notes that human rights law provides a “global script of legitimacy”.⁵⁰ This theory is contingent on the assumption that the conceptual and legal notions of sovereignty have moved from Westphalian notions towards a more relational conception of sovereignty where a state’s legitimacy is determined by whether or not it fulfils responsibilities towards its citizens.⁵¹ Whilst this line of argument risks overstating the significance of human rights law multilateral recognition of a state by an international

⁴⁶ See Richard Neilsen and Beth Simmons, ‘Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?’ (2015) 59 *International Studies Quarterly* 197.

⁴⁷ See Alter (n. 23) for a general description of this argument.

⁴⁸ See Andrew Moravcsik, ‘Explaining International Human Rights Regimes: Liberal Theory and Western Europe’ (1995) 1 *EJIR* 158.

⁴⁹ Michael Fowler and Julie Bunk, *Law Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press, 1995) 12.

⁵⁰ Jack Donnelly, ‘Human Rights: A New Standard of Civilization’ (1998) 74 *International Affairs* 1.

⁵¹ See Allan Rosas, ‘State Sovereignty and Human Rights: towards a Global Constitutional Project’ in D Beetham (eds) *Politics and Human Rights* (Blackwell 1995) Allan Rosas, ‘State Sovereignty and Human Rights: towards a Global Constitutional Project’ in D Beetham (eds) *Politics and Human Rights* (Blackwell 1995). Helen Stacy, ‘Relation Sovereignty’ (2003) 55 *Stanford Law Review* 2029.

organisation is, as Duxbury argues, often contingent upon a state demonstrating that they are complying with human rights norms.⁵²

A problem with the legitimacy theory is that it treats organisations capacity to grant legitimacy states as a fact and does little to explain why states would conclude that this is the case. The third major school of thought, acculturation theory provides some of the context for this process. Acculturation theorists maintain that states agree to membership of human rights organisations because they are effectively “socialised” through participating in international relationships that progressively lead them to adopt human rights norms.⁵³ Organisational membership is a symbol of socialisation and is one of several measures that demonstrate that a state is complying with human rights norms, making it legitimate in the eyes of other international actors.⁵⁴ Although, as Koskeniemi argues, analyses based on social factors shaping the nature of obligation risk the “occasional drift towards a kind of socio-psychological eclecticism” as they attempt to capture the relatively complicated nature of international legal obligations and the different forces affecting state compliance.⁵⁵ Acculturation explains why almost all states join some form of human rights organisation or enter into treaty regimes that allow an organisation to scrutinise a state’s compliance with international human rights law.⁵⁶

There is however a distinction between explanations as to why states seek membership of an organisation and why states comply with that organisation’s decisions about the content of human rights law. A statistical analysis of the ratification of human rights treaties led Hafner-Burton, Kiyoteru Tsutsui and John Meyer to the “unexpected” conclusion that states committing “acts of repression... are more likely to make strong and many legal commitments to international human rights”, seeing these as a way of externally demonstrating their status as a legitimate state.⁵⁷ This leads to what Xinyuan Dai calls the “compliance gap” between legal commitment and the actuality of state practice in international human rights law.⁵⁸ Hafner-Burton and Kiyoteru Tsutsui, in a 2005 study of the compliance gap, note that in the early-mid 1990s, whilst ratification of human rights instruments that involved organisational

⁵² Duxbury (n 5).

⁵³ Ryan Goodman and David Jinks, *Socializing states: Promoting Human Rights Through International Law* (OUP 2013) 34-7.

⁵⁴ On this point see Tomas Risse and Stephen Ropp, ‘introduction and overview’ in Tomas Risse, Stephen Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP 2013) 8-15. See also, from the same volume, Beth Simmons, ‘From Ratification to Compliance: Qualitative Evidence on the Spiral Model’.

⁵⁵ Martti Koskeniemi, ‘The mystery of legal obligation’ (2011) 3 *International Theory* 319, 321.

⁵⁶ Emilie Hafner-Burton, *Making Human Rights A Reality* (Princeton University Press, 2013) 5.

⁵⁷ Hafner-Burton and others, ‘International Human Rights law and the Politics of Legitimation: repressive States and Human Rights Treaties’ (2008) 23 *International Sociology* 115, 137.

⁵⁸ Xinyuan Dai, ‘The “compliance gap” and efficacy of international human rights institutions’ in Risse and others (n 52).

membership increased sharply, in the same states documented human rights abuses increased.⁵⁹ Hafner-Burton and Tsutsui's conclusion is that "weak institutional mechanisms to monitor and enforce" human rights give states a strong incentive to ratify human rights instruments "as a matter of window dressing."⁶⁰

This type of behaviour directly affects the way in which states relate to organisations with protection mandates. As Heather Smith-Cannoy notes in relation to treaty bodies, whilst there is often little relationship between signing a treaty and human rights compliance, there is a relationship between agreeing to be subject to an optional protocol that allows individual petition to treaty review bodies and treaty compliance.⁶¹ In short, the states that are often likely to be the most compliant with human rights treaties are in general more willing to agree to be subject to organisations with more powerful protection mandates. The converse position is also borne out by empirical evidence; Yvonne Dutton, in a study tracking the correlation between the relative power of protection mandates and state compliance, noted that states "with poorer human rights ratings more regularly commit to international human rights treaties with the weakest enforcement mechanisms."⁶² However, as Smith-Cannoy goes on to note, states which have recently engaged in a democratic transition (her research focuses on Eastern European states) are often more inclined to see membership of a human rights organisation with a strong protection mandate as means of safeguarding the democratic gains made during the transition process.⁶³ Courtney Hillebrecht notes, in her study of the Inter-American Human Rights Court – a judicial review type organisation – that many states in South America were keen to join the Court, and explicitly agreed to be subject to its protection mandate, in order to lock in the consequences of the democratic transfer they made from military dictatorship in the 1980s.⁶⁴ In chapter five the contingency of protection mandates will be explored further; what it is important to note at this point is that where states routinely comply with protection mandates, there is often a broader political foundation to that compliance. It also noteworthy in the context of "coercive socialisation", described above, that incentives to comply with an organisation's decisions, even if driven by an underlying political

⁵⁹ Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 *American Journal of Sociology* 1373.

⁶⁰ *ibid.*

⁶¹ Heather Smith-Cannoy, *Insincere Commitments: Human Rights Treaties Abusive States and Citizen Activism* (Georgetown University Press 2012) 88.

⁶² Yvonne Dutton, 'Commitment to International Human rights Treaties: The Role of Enforcement Mechanisms' (2012) 34 *University of Pennsylvania Journal of International Law* 1, 9.

⁶³ Smith-Cannoy (n 61) 89.

⁶⁴ Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (CUP 2014).

foundation, are not always acts that are taken because a state fully supports the content of that organisation's decision.⁶⁵

In order to conclude it is worth summarising the strand of argument running through this section; the first part detailed some of the contradictions in the concept of sovereignty but concluded that organisational membership was perfectly compatible with the notion of Westphalian sovereignty. The second part of this section noted that international human rights organisations could be distinguished by the relative legal power of their protection mandates but that all of these posed conceptual problems for the notion of state consent. Given that, this section sought to address the question of why states would join a human rights organisation and concluded that states have a broad set of incentives to join a human rights organisation, as this will make them appear a legitimate sovereign. However, the evidence shows that accepting an organisation's protection mandate, which is part of the wider issue of compliance, is not necessarily motivated by that same incentive.

(2) Institutional Opposition: The ipsetic potential of a protection mandate

Institutional opposition to a human rights organisation is where a state either engages in an act of legal non-compliance or pre-emptively acts to limit an organisation's protection mandate, justifying their actions on the basis that an organisation is encroaching upon their sovereignty. It originates because an organisation's protection mandate has the potential to give the organisation competing sovereign authority to the state in the narrow but ultimately important field of human rights protection. A protection mandate is the collective description for the legal powers that an organisation has to realise and protect human rights within an organisation's member states. Protection mandates are what Kal Raustiala terms the structure of an organisation; "the rules and procedures created to monitor parties' performance" under the rules that the organisation imposes to fulfil its objectives.⁶⁶ The protection of human rights permeates into many different areas of law- organisations are effectively challenging part of the state's claim to sovereignty. Authority over the law for the sovereign is vital, Joyce argues, because it defines their capacity to be legitimately sovereign; yet at the same time the "modern sovereign cannot escape its own dependence on law."⁶⁷ The first part of this section will show how a protection mandate gives an organisation the potential to position itself as a rival sovereign, by setting up an alternative and authoritative claim over the content of a

⁶⁵ Hurrell (n 39)

⁶⁶ Kal Raustiala 'Form and Substance in International Agreements'(2005) 99 AJIL 581, 585.

⁶⁷ Joyce (n 19) 89

state's laws in the field of human rights protection. This creates a tension between the external sovereign incentive to belong to a human rights organisation (outlined in section above) and domestic legal sovereignty, which, as the last part of this section argues, manifests itself in the form of institutional opposition.

(i) *Ipseity and protection mandates*

The protection mandate of an international human rights organisation and its relation to sovereignty is best understood as a form of ipseity – a concept Derrida identified as a form of power that allows an individual to position themselves as having “the right and the strength to be recognised as sovereign.”⁶⁸ In *Rouges*, Derrida identifies ipseity as the “principle of legitimate sovereignty”; arguing that it is not just the possession of force but the possession of legitimate force.⁶⁹ The sovereign will always contain or possess the possibility of its own self-governance; which as Brown argues, in Derrida's thinking means that even the democratic sovereign necessarily needs to be hostile to sources of authority or the possibility of outside authority.⁷⁰ The protection mandate of an international human rights organisation and its relation to sovereignty is best understood as a form of ipseity – a concept Derrida identified as a form of power that allows an individual to position themselves as having “the right and the strength to be recognised as sovereign.”⁷¹ In *Rouges*, Derrida identifies ipseity as the “principle of legitimate sovereignty”; arguing that it is not just the possession of force but the possession of legitimate force.⁷² The sovereign will always contain or possess the possibility of its own self-governance; which as Brown argues, in Derrida's thinking means that even the democratic sovereign necessarily needs to be hostile to sources of authority or the possibility of outside authority.⁷³ Ipseity is not just the power to declare self-governance but also to declare one's self-governance legitimate. This, Joyce argues, is important as defining sovereignty in a Westphalian sense, purely by its capacity for exclusionary force, does “nothing to stop anyone declaring himself sovereignty over whatever self-designated field of authority (a vegetable patch perhaps) they thought they had the strength to defend.”⁷⁴ As Sergei Prozorov notes, the

⁶⁸ Jacques Derrida, *The Beast and the Sovereign Volume 1* (Geoffrey Bennington tr Chicago University Press 2011) 66.

⁶⁹ Derrida (n 7).

⁷⁰ Wendy Brown, ‘Sovereign Hesitations’ in Peng Cheah and Suzanne Guerlac (eds), *Derrida and the Time of the Political* (Duke University Press 2009) 114, 119

⁷¹ Jacques Derrida, *The Beast and the Sovereign Volume 1* (Geoffrey Bennington tr Chicago University Press 2011) 66.

⁷² Derrida (n 7).

⁷³ Wendy Brown, ‘Sovereign Hesitations’ in Peng Cheah and Suzanne Guerlac (eds), *Derrida and the Time of the Political* (Duke University Press 2009) 114, 119

⁷⁴ Joyce (n 31) 95

very idea of “being oneself” as a subject is required before any form of claim to sovereignty can be established.⁷⁵

Derrida argues that when international human rights law is invoked as a source of authority on a human rights issue, such as the abolition of the death penalty, “one is calling into question the principle and the authority of the sovereign of the nation state” by invoking a humanity that is beyond its control or constraints.⁷⁶ Supranational human rights organisations institutionalise this process of “calling into question” the sovereign act of domestic law-making by possessing ongoing legal powers to question the content of laws. The ECtHR ruled in 1993 that Cyprus had to change its laws and the HRC concluded in 1994 that laws in the Australian state of Tasmania criminalising sexual orientation were incompatible with the right to equal treatment before the law.⁷⁷ In both cases, the state government noted that there was no popular demand to remove these laws and that there was no one in prison or under any form of criminal sanction because of the law. Both the ECtHR and the HRC asserted that human rights obligations overrode the other considerations that a state party may wish to make when formulating such laws. Regardless of the merits of these decisions, these cases demonstrate the capacity of human rights organisations to invoke a higher authority than that of the sovereign state to determine the content of a state’s laws. Organisation’s protection mandates have what can be best described as a potential towards ipseity or an ipsetic potential – whilst not always making a claim to ipseity, the legal structure of a protection mandate and organisational practice mean that an organisation has the potential to make a claim to sovereign-like authority over a state’s laws. There four ways in which protection mandates give an organisation ipsetic potential.

Firstly, human rights organisations claim expertise in the area of human rights protection that often directly conflicts with the sovereignty of nation states. The principle of speciality gives human rights organisations the competence to act in specific areas relating to human rights protection. Article 28 of the ICCPR states that members of the HRC are to have “recognized competence” in the field of human rights protection, indicating that Committee’s competence was derived from its members’ expertise. The African Charter empowers the African Commission on Human and Peoples’ Rights to “lay down principles and rules” on human rights, directly positioning the Commission as an alternate source of expertise and authority

⁷⁵ *ibid*

⁷⁶ Derrida (n 68) 70

⁷⁷ *Modinos v Cyprus* (1993) ECHR Application no 15070/89; *Toonen v Australia* (1994) No 488/1992, UN Doc CCPR/C/50/D/488/1992

on rights protection.⁷⁸ The ECHR allows the ECtHR to exercise far-reaching powers based on the expertise of its judges, including the power to decide disputes on its jurisdiction and competence.⁷⁹ The common theme in all of these provisions is a claim to knowledge and expertise as the basis of a claim to authority; it is not a claim to authority based on representation or a right to rule such as a democratic sovereign state might make. As one former UN Special Rapporteur Justice Abdoulaye Dieye of Senegal noted, it was “the long-standing practice” of some UN Bodies “[to assume] a wide competence to deal with large scale situations of violations of human rights”, which as a consequence meant that governments found it difficult to argue that they should not have their human rights records scrutinised.⁸⁰

In common with other international organisations, human rights organisations claim their expertise results in their overall political neutrality, which justifies their decisions. As Patricia Clavin and Jens Wessel note in relation to the League of Nations, the concept of seemingly impartial expertise allowed it to take overtly political positions and engage in political actions.⁸¹ This meant that claims to be exercising expertise often served as a shield for organisations to act politically, whilst at the same time denying the possibility of politics by claiming political neutrality. International organisations, Armin von Bogdandy and Ingo Venzke note, “do not operate as parts of polities that include functioning political legislatures” and rather rely on the initial decision of a state to enter into an organisation as their source of authority and expertise.⁸² This is problematic for the reasons Hathaway outlines above and, as von Bogdandy and Venzke note, it presumes that the possibility of exiting a treaty offers a “sufficient escape hatch” ignoring the fact that often “the costs of exit are prohibitively high.”⁸³ This gives the expertise, and hence the authority, of human rights organisations a form of permanency that is beyond the direct control of states; hence generating two rival claims as to the legitimate authority to determine the human rights laws that govern a community. Human rights organisations claim to expertise in the area of human rights protection can serve as a direct counterweight to traditional sovereign prerogatives, such as security. The ECtHR, when ruling on whether an individual could be deported to a state where they faced a risk of torture, held that there was no scope to allow a state’s concerns about security into such

⁷⁸ Art 45 (1)b, African Charter on Human and Peoples’ Rights, 1981, OAU Doc CAB/LEG/67/3

⁷⁹ See Art 32 & 48 European Convention on Human Rights ETS No 5

⁸⁰ BG Ramcharan, ‘Introduction’ from BG Ramcharan (ed), *The Principle of Legality in International Human Rights Institutions: Selected Legal Opinions* (Martinus Nijhoff Publishers 1997) 7

⁸¹ Patricia Clavin and Jens Wessel, ‘Transnationalism and the League of Nations: Understanding the work of its economic and financial organisation’ (2005) 14 *Contemporary European History* 465.

⁸² Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2012) 23 *EJIL* 7, 21.

⁸³ *ibid.*

decisions.⁸⁴ In this case, the Court's analysis of the case law on the prohibition of torture under the ECHR – in other words their 'expertise' – found that the state's security interest was secondary to the protection of the human rights.⁸⁵

Secondly, human rights organisations actively try to stand above the politics of the nation state in order to seem impartial and scrutinise a state's human rights record free from direct control by any one government. When judges at international tribunals are empowered to check a government's decisions in order to protect rights it can bring human rights law directly into tension with the desires of representative governments.⁸⁶ As Samantha Besson notes, imposing rights that constrain the democratic process is complex enough in domestic law and even more complex in international law.⁸⁷ Given the mechanisms for amending the structure and substantive jurisdiction of human rights organisations are highly inflexible and opaque, often requiring exhaustive deliberative processes and international summits, individual states are somewhat limited in their ability to directly create the norms that will constrain their capacity of action. This means that there is a disconnect between human rights organisations, which are democracy-constraining but rights-protecting, and democratically elected governments, who can claim a broader democratic legitimacy for their actions. Derrida argues that in the international sphere, when international human rights law questions the actions of governments human rights are placed beyond the reach of politics, creating a situation that Carl Schmitt described as the end of politics. For Schmitt, nation states were inherently antagonistic entities and whilst not in a perpetual state of war, it was the possibility of war between states that shaped the potential for interstate politics and the creation of sovereign identities.⁸⁸ Derrida and Schmitt are both sceptical about the possibility of purely disinterested and apolitical humanitarian supranationalism. Schmitt is concerned that any such construction is simply a Trojan horse for other interests and Derrida cannot conceive of a politics of humanism that can exist without reference to the presence of an enemy of humanity.⁸⁹

This is part of a broader trend identified by Koskeniemi, who notes that debates about the protection of human rights in international law are dominated by a "liberal impulse to escape

⁸⁴ David Bonner, 'If you cannot change the rules of the game, adapt to them: United Kingdom responses to the restrictions set by Article 3 ECHR on 'national security' deportations' in Rob Dickinson and others (eds.), *Examining critical perspectives on Human Rights* (CUP 2012).

⁸⁵ *Chahal v. United Kingdom* (1996) 23 EHRR 413.

⁸⁶ See Connor Gearty 'Spoils for which victor? Human Rights within the democratic state' in Conor Gearty and Costas Douzinas (eds.) *The Cambridge Companion to Human Rights Law* (CUP 2012).

⁸⁷ Samantha Besson, 'Whose Constitution(s)' in Jeffery Dunoff and Joel Trachtman (eds) *Ruling the World? : Constitutionalism, International Law and Global Governance* (CUP 2009) 289.

⁸⁸ Carl Schmitt, *The Idea of the Political* (trans George Schwab Chicago University Press 1996 ed.) 25-37.

⁸⁹ Derrida (n 75) 71-5

politics.”⁹⁰ The structures of international organisations, Koskeniemi argues, have enabled a dilution of some of the fundamental questions surrounding basic human rights, in particular the question of the legitimacy of a supranational agency in scrutinising states human rights records.⁹¹ The attempt to escape politics is not an eradication of politics, but rather the creation of a new cosmopolitan politics that belongs to international organisations and can openly conflict with the politics of its member states. This directly seeks to supplant the sovereign state as lawmaker and positions an organisation as a rival political opponent to the state government. Sonia Cardenas argues that there are three basic reasons why states violate human rights agreements they are party to.⁹² Firstly, states cite national security, or a form of national security-based reasoning, to justify breaching human rights law as a matter of national necessity. Secondly, they claim a form of cultural or national exceptionalism that means that they are justified in protecting some, but not all rights protected by international human rights instruments. Thirdly, they claim that they are violating human rights in the interests of a pro-violation constituency. Whilst the terms of Cardenas’ categorisation are debatable, it is important to note that all of her categories refer to decisions taken by a government on behalf of domestic political constituencies. Therefore, for an organisation to decide that a state is in violation of an international agreement often means putting themselves in the position of a political opponent to that state’s political decisions.

Thirdly, human rights organisations have an ipsetic potential as they bypass the governments of states to protect citizens in the nation state, which directly conflicts with their sovereignty. Supranational organisations suffer from what Johan Schaffer describes as the problem of the inverse relation of authority – the principal beneficiaries of the exercise of an international organisation’s protection mandate are not states but individuals within states.⁹³ Beth Simmons notes the seeming paradox - whilst international human rights organisation’s emerge through the process of negotiations between states they “create stakeholders almost exclusively domestically”, which seemingly gives states little reason to accept an organisation’s protection mandate if they are concerned they will be subject to it.⁹⁴ Geir Ulfstein argues that from the perspective of a state party by explicitly empowering organisations to make rulings against

⁹⁰ Martti Koskeniemi, ‘The Politics of International Law’ (1990) 1 *EJIL* 6

⁹¹ *ibid*

⁹² Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (University of Pennsylvania Press 2010) 27-9

⁹³ Johan Schaffer, ‘Legitimacy, global governance and human rights institutions: inverting the puzzle’ in Andreas Føllesdal and others (n 2)

⁹⁴ Beth Simmons, *Mobilizing for Human Rights International Law in Domestic Politics* (CUP 2009) 126

states, protection mandates represent “the most serious interference in state sovereignty”.⁹⁵ In *‘Society must be Defended’*, Michel Foucault notes that in the “classical theory of sovereignty, the right of life and death was one of the sovereign’s basic attributes”, which was the origins of biopolitical power in the twentieth century.⁹⁶ This type of power required direct control over the population through the disciplinary apparatus of the state. Human rights organisations, by conferring advantages directly upon citizens and bypassing state governments, implicitly challenge this type of power. One direct area of organisational practice where this can be seen is in the capacity of judicial review type organisations to order remedies, which as Diana Shelton argues, are effectively equivalent to domestic judicial “procedures against the state” to defend the rights of citizens.⁹⁷ As Shelton goes on to note, human rights cases – as well as providing rights to individual’s to use against the state – have also been viewed as a means to uphold human rights law in the wider “interests of the international community.”⁹⁸ Therefore, the capacity of an organisation to issue remedies to injured parties not only breaks the control of the state over its citizens, but in doing so also situates citizens within a wider international community, further diluting the power of the state over its citizens.

Finally, a human rights organisation’s powers are grounded not just in the positive law of their constituent instrument, but also in moral principles, as the organisation exists to prevent human rights violations. This is an often-understated element of ideational theories and harks back to the political climate in the aftermath of World War Two where, as Mark Mazower argues, there was a sense that “civilization needed to be saved” and institutions created to accomplish this function.⁹⁹ Often, the reason for joining a judicial review model organisation is located within a particular political event, as was the case with ECtHR, which states joined specifically because they wanted to protect their sovereignty from the existential threat of a recurrence of fascism or a communist takeover.¹⁰⁰ In a speech to the Consultative Assembly of the Council of Europe in 1949, the French Minister of Information Pierre-Henri Teitgen explicitly envisaged creating an interventionist court of human rights when he warned that totalitarianism crept into states gradually, weakening constitutional levers and making it

⁹⁵ Geir Ulfstein, ‘Individual Complaints’ in Geir Ulfstein and Helen Keller (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 75

⁹⁶ Michel Foucault, *‘Society must be defended’* (David Macey trans Penguin 2003) 240 -5.

⁹⁷ Diana Shelton, *Remedies in International Human Rights Law* (2nd ed OUP 2005) 3.

⁹⁸ Ibid.

⁹⁹ Mark Mazower, *Governing the World: The History of an Idea* (Penguin Books, 2012). 40-1.

¹⁰⁰ Moravcsik broadly follows this line of argument; Andrew Moravcsik, ‘The Origins of Human Rights Regimes Democratic Delegation in Postwar Europe’ (2000 54 IO) 217.

“necessary to intervene before it is too late.”¹⁰¹ During the drafting of the ECHR an agreement was only secured on the creation of a powerful court of human rights was because states were convinced that it would only act against states where there were fundamental violations of human rights.¹⁰² Appealing to moral authority is a justificatory mechanism for an organisation to exercise its protection mandate in areas that were not explicitly envisaged in the original agreement underpinning the organisation. To some extent this a problem common to all international organisations, as Konstantinos Magliveras notes the terms of a state’s entry into an international organisation often do not “reflect reality” and provide an imperfect guide to the organisations future functions, the capacity of a human rights organisation to specifically invoke transcendent morality gives a powerful rhetorical defence to this practice.¹⁰³

Collectively, these four aspects of an organisation’s protection mandate give it an ipsetic potential. GEM Ascombe notes that for a state’s law-making authority to be considered legitimate it cannot simply rely on coercion or an appeal to a common good; rather, a state has to possess a “customary right to obedience”, which can then be enshrined into law.¹⁰⁴ An organisation’s claim to expertise, political neutrality, protection of citizens and general moral mission cumulatively give the organisation an authoritative voice – or at least an authoritative claim to tell a state what it’s laws should be in an international sphere that has, as the first section of this chapter argued, become more conditioned to view a commitment to human rights as a necessary component of sovereignty. This pre-existing claim to authority is enshrined into international law by a protection mandate and gives the organisation the juridical potential to make a claim as to what a state’s laws should be in order to protect human rights. This is what Joyce calls auto-positioning, or making a rival claim to sovereignty, as it is a claim to act as the legitimate lawmaker in a particular area.¹⁰⁵ As shown in the final part of this section, it is a reaction against the ipsetic potential of an organisation that causes states to engage in institutional opposition.

(ii) Gradations of Institutional Opposition

¹⁰¹ JG Merrills and AH Robertson, *Human Rights in Europe: A study of the European Convention on Human Rights* (Manchester University Press 1996) 4.

¹⁰² Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 73.

¹⁰³ Konstantinos Magliveras, ‘Membership in international organizations’ in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011).

¹⁰⁴ GEM Ascombe, ‘On the Source of Authority of the State’ in Joseph Raz (eds.) *Authority* (New York University Press, 1990) 170-1.

¹⁰⁵ Joyce (

Institutional opposition is a reaction to the ipsetic potential of an organisation and a restatement of state power; in this sense it is a symbolic reassertion of state power. Oscar Guardiola-Rivera notes that a common feature of modern sovereignty in the age of globalisation is the tendency to look for symbolic demonstrations of sovereign power and invoke symbols of exclusionary Westphalian sovereignty.¹⁰⁶ This occurs at a point where, due to a number of factors (such as economic globalisation and the growth of transnational judicial regimes) sovereignty has become increasingly fragmented and multi-layered.¹⁰⁷ Brown has argued that the tendency of states to construct walled borders – like Israel’s security wall and the US-built fence between itself and Mexico – are attempts by states to define their sovereignty and assert their capacity to fulfil the “key characteristics” of Westphalian sovereignty.¹⁰⁸ In a similar fashion, institutional opposition demonstrates that a state possesses the key attributes of Westphalian sovereignty.

It is important to understand that institutional opposition exists on a spectrum of intensity. This reflects both the powers of that organisation and also the philosophical approach of states to defining their sovereignty. This does not entail a perpetually adversarial relationship, but one where there is a necessary difference and tension between a state and the organisation, in the same way that in a domestic constitutional system the process of judicial review engenders a potential tension between the executive and judicial branches of government. Brad Roth actively rejects the idea that sovereignty and human rights are always in tension with one another, arguing that the two concepts play “distinct and incommensurable roles within a single [international] legal order.”¹⁰⁹ Costas Douzinas, in a critique of international human rights law, argued that when “human rights and national interests coincide” governments become their greatest champions, but noted that this was often the exception.¹¹⁰ His deeper concern was that government-controlled human rights law had the potential to become a “poacher-turned-gamekeeper” in that an institution that had been created to resist and oppose governmental power could be used to endorse it.¹¹¹ Therefore, some level of institutional opposition demonstrates that an organisation is functioning properly and protecting individuals within states. A complete alignment between a state and a human rights organisation could be a sign that the organisation has been subject

¹⁰⁶ Oscar Guardiola-Rivera, ‘What comes after sovereignty?’ in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge-Cavendish 2011).

¹⁰⁷ On this point see Jan Scholte, ‘Globalization and Governance: From Statism to Polycentrism’ Centre for the Study of Globalisation and Regionalisation, University of Warwick, CSGR Working Paper No. 130/04 (2004); Henkin (n 9).

¹⁰⁸ Brown (n 22) 24.

¹⁰⁹ Roth (n 11) 4.

¹¹⁰ Costas Douzinas, ‘Human Rights, Humanism and Desire’ (2001) 6 *Journal of Theoretical Humanities* 813.

¹¹¹ *ibid.*

to state capture. In the same way that in a domestic constitutional system, the government would not expect to win every judicial review of an executive decision, states should not expect a complete alignment between their interests and the decisions of a human rights organisation. Low-level institutional opposition is therefore a necessary by-product of a protection mandate, but at the more intense level it represents a definitive attack on the organisation by a state party. Rather than divide instances of institutional opposition into categories, it is best to illustrate the spectrum of institutional opposition's intensity with reference to some examples at different points along the scale.

At a low level, institutional opposition involves practices such as a state failing to file annual reports on human rights protection within their country. As a report from the UN Secretary-General outlined, the treaty body reporting process was part of the "obligation of all States to promote respect for the rights and freedoms" and they should view it as an opportunity "to take stock of the state of human rights protection within their jurisdiction."¹¹² Failure to report can actively weaken a human rights organisation - as Nihal Jayawickrama notes, the Committee on Economic, Social and Cultural Rights has struggled to gain adequate reports from some state parties, which has enabled them to obstruct the Committee's operational capacity.¹¹³ Systemic failure to follow reporting procedures marginalises the work of a human rights organisation. Importantly, the actual expenditure and resources required by a state party to engage in the reporting process is minimal; the systemic failure of some states to engage in reporting process can constitute opposition if it occurs in a manner that is premeditated and systematised.¹¹⁴ Resisting the implementation of an organisation's decisions on technical grounds is another example of low level institutional opposition. The Netherlands disagreed with an HRC decision on asylum policy regarding minors, stating that the HRC was departing from its previous approach to dealing with asylum cases, but, stressing the serious nature of the case, the HRC ordered a remedy on the merits.¹¹⁵ The Netherlands did not deport the applicant but refused to alter their law to prohibit a similar case happening again. This was not simply a technical dispute, but was a dispute that specifically related to the competence of the organisation and the importance of the sovereign state in deciding the content of their laws.

¹¹² Compilation of Guidelines on the Form and Content of Reports to be submitted by states parties to the International Human Rights Treaties HRI/GEN/2/Rev.5 29 May 2008 para 7-9.

¹¹³ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National Regional and International Jurisprudence* (CUP 2002) 132-3.

¹¹⁴ See Suzanne Egan, *The UN Human Rights Treaty System: Law and Procedure* (Bloomsbury Professional 2011) 172-4

¹¹⁵ *XHL v The Netherlands* CCPR /C/97/D/1564/2007.

The most common form of institutional opposition is a demarcation dispute that can often be performative in nature. Jessie Allen, in her analysis of the Inter-American Commission on Human Rights (IACHR), notes that its scrutiny processes are often theatrical in nature and that the performance of governments when receiving criticism of their human rights records is important in shaping the way that the organisations' power develops.¹¹⁶ Equally, where governments reject the recommendations of international organisations on the grounds of sovereignty – as the government of Bolivia did when it rejected IACHR findings that its media regulations violated the right to free speech – it can also serve to define their sovereignty.¹¹⁷ The Brazilian government strongly criticised the Convention Against Torture's review body the Committee Against Torture (CAT) after it launched an enquiry into Brazilian prison conditions. They focused upon the perceived expansion of the CAT's mandate to conduct enquiries when there was no evidence of a "deliberate plan or policy for the occurrence of the practice of torture" insisting that Brazil was willing to investigate prison reform but insisted that the CAT was departing from the powers in its protection mandate.¹¹⁸ Generally there is a strong level of compliance with the CAT's decisions, but there has been resistance regarding implementing interim protection measures and several states have attempted to extradite individuals to regimes where they are at risk of torture.¹¹⁹ Overall, demarcation disputes are given an added impetus as in many states domestic courts engage in what Yuval Shany describes as a "shadow effect" where expectations about an organisation's "future performance" affect domestic legal institutions.¹²⁰ Whilst not a direct challenge to a state's sovereign powers of law-making this illustrates how an organisation, particularly judicial review and treaty body organisations, can have a direct legal affect within a state. Part of the opposition from the UK toward the ECtHR has focused on the way that domestic courts 'shadow' its decisions under the legislation that brings the ECHR into UK domestic law.¹²¹

At a more intense level, the reaction of a state to the decisions of a human rights organisation following a successful individual petition can act as a reassertion of the sovereignty of their domestic legal processes in the face of supranational censure. South Korea has consistently

¹¹⁶ Jessie Allen, 'Theatre of Human Rights' paper presented at *The Association for the Study of Law, Culture and the Humanities 2013 Conference*, Birkbeck College University of London, 23 March 2013.

¹¹⁷ For background see OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION STATES ITS CONCERN OVER THE ENACTMENT OF THE COMMUNICATIONS ACT IN ECUADOR, Press Release, R47/13 <<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=928&IID=1>> accessed 10 July 2015.

¹¹⁸ REPORT ON BRAZIL PRODUCED BY THE COMMITTEE UNDER ARTICLE 20 OF THE CONVENTION AND REPLY FROM THE GOVERNMENT OF BRAZIL CAT/C/39/2 para. 236, 241.

¹¹⁹ Egan (n 108).

¹²⁰ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 77.

¹²¹ See Helen Fenwick, 'What's Wrong with s.2 of the Human Rights Act?' UK Constitutional Law Association October 2012 <<http://ukconstitutionalaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/>> accessed 16 May 2015.

refused to implement two HRC decisions relating to decriminalising conscientious objection to conscription. It has stated that the overall security situation, the ongoing threat from North Korea and strong public opinion in favour of conscription, meant they would not consider changing the law.¹²² In response to the ECtHR's judgment in *Hirst v UK* – the decision that held the UK's blanket ban on prisoners voting was disproportionate under the ECHR – the UK government argued that the court had become illegitimate and was ruling in areas beyond its competence.¹²³ The UK government had expressed concerns about the powers of the ECtHR since the early 1970s; but from the late 1990s, after reforms enhanced the power of the Court, leading politicians and judges openly questioned its legitimacy and claimed that it had expanded its powers beyond its original mandate.¹²⁴ In a 2012 speech to the Council of Europe – the ECtHR's supervisory organisation – the UK Prime Minister insisted that the Court must treat decisions taken “at the national level ... with respect” in a clear assertion of sovereign authority.¹²⁵ This level of opposition, whilst being openly hostile to an organisation's ipseity potential, does not openly envisage withdrawing from the organisation.

At its most extreme, institutional opposition seeks to actively remove nations from human rights organisations, justify complete non-compliance or, in some cases, abolish them all together. This is often underpinned by a latent political position about the role of state sovereignty. Anti-imperialist opposition fits into this category as does American exceptionalism, which is underscored by a belief in democratic exceptionalism of the US. For many years in the US there was a political strong movement, inspired by Senator John Bricker, to withdraw from all international human rights treaties because of the implicit challenge they posed to the US Constitution as the supreme source of law.¹²⁶ Senator Bricker framed his concern about “international agencies” in terms of legitimacy and democratic control, arguing that there was a danger of the “Soviet controlled” UN interfering in the US' domestic affairs.¹²⁷ Commenting on this, John Jackson notes that the argument that a treaty infringes US sovereignty in essence maintains that a “set of decisions should be made, as a matter of good governmental policy, at the nation- state (US) level and not at the international level.”¹²⁸ This

¹²² The cases are *Kim et al v Republic of Korea* CCPR/C/106/D/1786/2008 and *Jeong et al. v Republic of Korea* CCPR/C/101/D/1642-1714/2007.

¹²³ For an overview see Danny Nicol, ‘Legitimacy of the Commons debate on prisoner voting’ (2011) *PL* 681.

¹²⁴ Ed Bates, ‘British sovereignty and the European Court of Human Rights’ (2012) 128 *LQR* 32.

¹²⁵ Cameron's speech on the European court of human rights in full *The Guardian* 25 January 2012 <<http://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full>> accessed 10 March 2014.

¹²⁶ The history of this is outlined in Natalie Hevener Kaufman and David Whiteman, ‘Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment’ (1998) 10 *HRQ* 309.

¹²⁷ *ibid.*

¹²⁸ John Jackson, ‘Sovereignty - Modern: A New Approach to an Outdated Concept’ (2003) 97 *AJIL* 782, 790.

was not simply an efficacy argument: the hostility behind Bricker's proposals was in part inspired by US exceptionalism and the concern that the UN might exert a rival claim or a rival control over the institutions of the US government.¹²⁹ Although this is the most extreme form of institutional opposition, it is linked to earlier forms of institutional opposition by its defence of sovereignty in the face of international organisations.

(iii) *Pre-emptive institutional opposition and the role of organisation design*

This type of institutional opposition is explicit – it directly responds to the challenge of the ipsetic potential of human rights organisations. There are however other international practices, to use the terminology of – , which are also can be read as acts of institutional opposition as they involve a pattern of state action based around limiting the future power of protection mandates. One such example of this is 'forum shopping' where states deliberately choose organisations with weak protection mandates or place reservations on the operation of protection mandates. Trinidad and Tobago withdrew from the First Optional Protocol to the ICCPR – the instrument allowing individual petitions to the HRC – after a politically controversial petition from an individual on death row reached the HRC, and then re-joined with reservations to prevent such appeals happening again.¹³⁰

In order to avoid the ipsetic potential of a protection mandate, some states have also engaged in pre-emptive institutional opposition, where they deliberately shape organisations to have a limited or ineffectual protection mandate. Andrew Guzman terms this the "Frankenstein problem", arguing that fear of an organisation expanding its powers – becoming in effect a sovereignty-compromising "monster" – leads states to create organisations with deliberately weak enforcement powers or dispute resolution mechanisms designed to favour the state party.¹³¹ Pre-emptive institutional opposition can be explained with reference to the rational design theory of organisations outlined in this study's introduction. States, whilst seeing the benefits of organisational membership, can often be risk averse to organisational procedures and the perceived future actions of the organisation and therefore may seek to design the organisation to reflect these concerns.¹³²

¹²⁹ John Worth, 'Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker' (2004) 79 Indiana Law Journal 245.

¹³⁰ Glenn McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol' (2001) 23 HRQ 769.

¹³¹ Andrew Guzman, 'International organizations and the Frankenstein problem' (2013) 24 EJIL 999.

¹³² Barbara Koremenos and Others The Rational Design of International Institutions in Barbra Koremenos, Charles Lipson and Duncan Snidal (eds.) *The Rational Design of International* (CUP 2004) 20-24

Pre-emptive institutional opposition is particularly common where states wish to appear to be human rights compliant, but want to avoid confronting an organisation with ipsetic potential. The Association of South East Asian Nations (ASEAN) Intergovernmental Commission on Human Rights is a case in point. The organisation has existed as a loose intergovernmental association since 1967 and was for many years committed to non-interference in sovereign affairs.¹³³ In 1993, the organisation issued a statement calling for the creation of a regional human rights mechanism but this came a few months after the Bangkok Declaration, which affirmed ASEAN's "respect for national sovereignty ... and non-interference in the internal affairs" of states.¹³⁴ These two declarations had the potential to be in severe tension with one another and for some years, the creation of a rights protection mechanism stalled. The organisation only had a legal framework that committed it to the creation of a human rights mechanism after the 2007 ASEAN Charter had been adopted.¹³⁵ However, ASEAN were split between states such as Thailand and Malaysia, who argued that the proposed organisation should have powers to monitor and enforce human rights standards and states, such as Cambodia and Vietnam, who argued that the organisation should be advisory in nature. The latter group of states won the day and the ASEAN Intergovernmental Commission on Human Rights (AICHR) Terms of Reference stated that "non-interference in the internal affairs of ASEAN Member States" and "respect for the right(s)" of states were to be core principles of the organisation.¹³⁶ This, as Tan Hsien Li argues, was a way of ensuring that the ASEAN way of "consultation and consensus" continued, even though it left the organisation without any operational protection mandate.¹³⁷ This neuters any ipsetic potential that the AICHR could have had, and is an example of states pre-emptively engaging in what amounts to institutional opposition at the point of the organisations design and creation.

(3) Anti-imperialism and institutional opposition: the symptoms of sovereign inequality

The preceding two sections of this chapter identified how competing conceptions of sovereignty both cause a state to enter into a human rights organisation, and lead it to engage in direct institutional opposition when it exercises its protection mandate or pre-emptive institutional opposition to prevent it from gaining a protection mandate. This section examines

¹³³ Yuval Ginbar, 'Human Rights in ASEAN Setting Sail or Treading Water' (2010) 10 HRLR 504

¹³⁴ *Bangkok declaration on human rights*, adopted by the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 Mar - 2 Apr 1993 A/CONF.157/ASRM/8-A/CONF.157/PC/59.

¹³⁵ Ginbar .(n 128)

¹³⁶ ASEAN Intergovernmental Commission on Human Rights Terms of Reference 2(b) and (c) <<file:///C:/Users/ubfcow01/Downloads/TOR-of-AICHR.pdf>> accessed 10 May 2013.

¹³⁷ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in South East Asia* (CUP 2011) 141.

how the imperialism of international law – in particular, its creation of sovereign inequalities between postcolonial and formerly colonialist states – generated the specific form of anti-imperialist institutional opposition. To understand what is meant by the imperialism of international law, it is important to return to the idea of residual imperialism – literally, the residue of colonial-imperialist patterns of power within the international law. International law's creation was heavily influenced by the states that engaged in colonial imperialism and as BS Chimni notes this meant that new and old forms of imperialism found their home in international law.¹³⁸ Chapter two examines how international human rights law can be utilised in the service of neo-imperialism. What is relevant for the examination of institutional opposition is how the residual imperialism of international law has created juridical inequalities between states, affecting institutional opposition from postcolonial states.

It is first necessary to briefly outline how sovereignty itself is constructed by international law. International law, as a Sundhya Pahuja argues, “produces its own subjects as well as the objects of its rule” – meaning ideas such as universality and sovereignty were directly created by its structures.¹³⁹ European conceptions of sovereignty underpinned the development of international law during the period of colonial-imperial expansion in the late eighteenth and early nineteenth century.¹⁴⁰ Whilst sovereignty may have come into existence as a political concept in Western Europe in the seventeenth century, its expansion and entrenchment into international law was interwoven with the process of colonial-imperialism.¹⁴¹ As Frédéric Mégret notes, colonialism was justified by the premise that “non-European political entities did not satisfy the demands of sovereignty” as it was understood in international law at the time, as the sovereign subjects of international law had been constructed with reference to the occidental narrative of what constituted a state.¹⁴² Even after decolonisation, sovereignty was still constructed and controlled by international law; as Antony Anghie notes, the League of Nations mandate system – which set up a system for managing the colonies of the defeated powers in World War One – constructed a new form of legal infrastructure to manage the creation of new states.¹⁴³ The territorial shape of the postcolonial state, its institutions and its political foundations were often effectively constructed by formerly colonialist states during decolonisation the decolonisation process in the 1950s and 1960s; as Upendra Baxi noted, the

¹³⁸ BS Chimni, ‘Legitimizing the International Rule of Law’ in Crawford and Koskeniemi (n 38) 306-7.

¹³⁹ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 26.

¹⁴⁰ Andreas Oisander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55 IO 251.

¹⁴¹ Lauren Benton, *A Search of Sovereignty: Law and Geography in European Empires, 1400 -1900* (CUP 2010) 280-1.

¹⁴² Frédéric Mégret, ‘International Law as Law’ in Crawford and Koskeniemi (n 38) 65.

¹⁴³ Anthony Anghie, *Imperialism Sovereignty and the making of International Law* (CUP 2004)

“logic of colonialism” was perpetuated in the postcolonial nation state.¹⁴⁴ John Hobson links this directly to imperialism, arguing that the 19th century lawyers who first devised the concept of a “standard of civilisation” helped construct a distinctly hierarchical system of international relations, which still contains Eurocentric assumptions.¹⁴⁵ However, he specifically notes that “Eurocentric institutionalism” has helped perpetuate many of the assumptions of international law from the colonial-imperial era.¹⁴⁶ As Gerry Simpson concludes, international law functions as a form of “legal hegemony” which perpetuated a regime of unequal sovereigns after decolonisation.¹⁴⁷

The first part of this section will argue that the juridical inequality of postcolonial states explains the emergence of the Third World bloc as a mechanism for advancing the interests of postcolonial states against the imperialism of international law. Anti-imperialism – in part directed against the imperialism of international law – was the Third World bloc’s collective ideology, and unified postcolonial states as a voting bloc. This, as the second part of this section argues, led to a Third World bloc approach to human rights law that saw human rights as a tool for advancing decolonisation. Whilst understandable, given that colonial rule was a significant source of human rights abuses, this led the Third World bloc to argue that international human rights organisations’ protection mandates should not apply to states within the Third World bloc. The final part of this section shows how both sovereign inequalities and the Third World bloc’s collective approach to international human rights law were the presumptions behind anti-imperialist institutional opposition from the Third World bloc.

(i) *Sovereign inequality and the formation of the Third World bloc*

The way that postcolonial states were structured by international law had an effect on postcolonial states external sovereignty. Gaining recognition as a majority-ruled sovereign state – what Krasner terms international legal sovereignty – was what most colonial independence movements sought.¹⁴⁸ Self-determination was already a recognised right within international law, but, as John Charvet and Elisa Kaczynska-Nay note, it was often framed in “ethno-cultural terms” and groups living under colonial rule were thought to be incapable of

¹⁴⁴ Upendra Baxi, *The Future of Human Rights* (OUP 2003) 36.

¹⁴⁵ John Hobson, ‘The Twin Self-Delusions of IR: Why ‘Hierarchy’ and Not ‘Anarchy’ is the Core Concept of IR’ (2014) 42 557, 559.

¹⁴⁶ *ibid.* 560.

¹⁴⁷ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International legal Order* (CUP 2004) 70-74.

¹⁴⁸ Krasner (n 14).

governing themselves.¹⁴⁹ Postcolonial states that had gained independence prior to the 1950s gained recognition as sovereign states from colonial powers because it was political expedient for them to do so, not because postcolonial states had a right to be recognised as sovereign. Anticolonial activists therefore sought to shape a non-racial interpretation of the right to self-determination, and at the UN postcolonial states lobbied for the inclusion of a new, anticolonial definition of self-determination within international law. The first key legal instrument to recognise anti-colonial self-determination was the General Assembly Resolution on the Granting of Independence to Colonial Countries and Peoples in 1960, which created an expectation of full and equal sovereignty for postcolonial states.¹⁵⁰ The 1970 Declaration on Friendly Relations Between States attempted to formalise the principle of equal sovereignty between states.¹⁵¹ Yet this was something of a juridical fiction, based on the position in customary international law that if a state had the capacity to enter into diplomatic relations they would attain parity with other states.¹⁵² Crucially, a postcolonial state's membership of an international organisation did not make their sovereignty directly equivalent to the sovereignty of formerly colonialist states. There are three juridical inequalities in international law between formerly colonialist and postcolonial states that have led to their relative marginalisation in international organisations.

Firstly, because customary international law emerged out of interactions between formerly colonialist states, it principally reflected their interests. The international law of treaties, William Coplin observes, has a history rooted within "sovereign prerogatives" as "statehood itself was defined in part as the ability to make treaties", territories under colonial rule could not formulate treaties or participate in the shaping of the law of treaties.¹⁵³ In *Portugal v India*, the ICJ held that a 18th century trading agreement between Portugal and the current Indian state of Marathas was not a treaty, but a manifestation of the "feudal authority" of Marathas state.¹⁵⁴ Even after decolonisation, postcolonial states had to abide by the customary law of treaties, which were treated as codified into international law. As Anand describes it, Asian states had "lost their personality" during the colonial era and as a consequence "could not play an active role in the development of international law during the most creative period in

¹⁴⁹ John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (CUP 2008) 117.

¹⁵⁰ A/Res 1514 (XV) 14 Dec 1960.

¹⁵¹ A/Res 2625 (XV) 24 Oct 1970.

¹⁵² Michael Cosnard, 'Sovereign Equality - "The Wimbledon sails on"' from Michael Byers and Georg Nolte (eds) *United States Hegemony and the Foundations of International Law* (CUP 2003).

¹⁵³ William Coplin, 'International Law and Assumptions about the State System' (1965) 17 *World Politics* 615.

¹⁵⁴ *Portugal v India* ICJ Reports (1960) 6

its history.”¹⁵⁵ Singh also follows this line of argument noting how “the new family of nations” that international law aimed to construct largely excluded postcolonial states from participation.¹⁵⁶ This was broadly true of the majority postcolonial states, which had had relatively little input into the creation of international law, but were expected to be bound by it following independence. Even though they possessed notional equality in lawmaking international law, functionally that equality operated within a framework where there were existing restrictions.¹⁵⁷

Secondly, international law had a role in creating many of the material inequalities experienced by postcolonial states. Paul Harrison and Peter Worsely have independently produced analysis demonstrating links between international law and the relative economic inequality of postcolonial states.¹⁵⁸ This has deep roots in colonial-imperialism; as the political economies of colonial territories were geared towards the metropolitan centres of colonial empires, their relative development as national economies was often bizarrely stunted. This was particularly acute in Africa, where upon gaining independence some states did not even have telephone and railway lines connecting them to their immediate geographical neighbours.¹⁵⁹ In their exhaustive study of the causes of state failure, Daron Acemoglu and James Robinson note that patterns of colonialism and the structure of the political economy of colonised territories had a direct impact on the economic prospects of postcolonial states.¹⁶⁰ Many of the economic interests that had profited from colonialism by running mines, railways and other commercial enterprises continued to do so after decolonisation, because of careful attempts by the owners of such enterprises to preserve their economic domination. As Sundhya Pahuja notes, formerly colonialist powers, using the mechanisms of international law, helped preserve these inequalities by protecting investors when initiatives aimed at enshrining the permanent sovereignty over their natural resources were brought before the UN General Assembly and the UN Conference on Trade and Development.¹⁶¹ Formerly colonialist states often resisted reforms aimed at overcoming the material inequalities experienced by postcolonial states, by refusing to support legal instruments proposed by the Third World bloc

¹⁵⁵ R. P. Anand, *New States and International Law* (Vikas Publishing House 1972) 20.

¹⁵⁶ Prabhaker Singh, ‘From Narcissistic’ Positive International Law to “Universal” Natural International Law: The Dialectics of “Absentee Colonialism’ (2008) 16 *African Journal of International and Comparative Law* 56, 59.

¹⁵⁷ Steven Ratner *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015) 192-7.

¹⁵⁸ Paul Harrison, *Inside the Third World* (Pelican Books, 1982) 41-6;. Peter Worsely, *The Three Worlds: Culture & World Development* (Weidenfeld & Nicolson, 1984) 310, 326-9.

¹⁵⁹ See Martin Shipway, *Decolonization and its Impact: A comparative Approach to the end of the Colonial Empires* (Blackwell Publishing 2008) ch 5.

¹⁶⁰ Darren Acemoglu and James Robinson, *Why nations fail: The origins of power, prosperity and poverty* (Crown Business Publishing 2012) ch 2.

¹⁶¹ Pahuja (n 140) 103-113.

and arguing that any international instrument to which they had not expressly consented could not legally bind them. However, as Anghie notes, postcolonial states were bound by international laws, to which they had never consented, such as the laws surrounding property rights and the ownership of natural resources, which impacted their material security.¹⁶²

Finally, and most importantly in the context of this study, the absence of postcolonial states from participation in the formation of international organisations meant that they emerged as reflections of the colonial-imperial international order. Prior to World War One, it made little sense to speak of the law of international organisations as a distinct branch of international law. Most international organisations were simply a reflection of their constituent treaties and aimed to preserve the peaceful coexistence between states in designated areas, such as the protection of a particular river or form of trade.¹⁶³ It was only after the creation of the League of Nations in 1919 that there was a separate non-state legal personality in the international system. The League's Charter permitted the existence of colonies "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world" and set up a peer-review process for admission.¹⁶⁴ This effectively preserved the power of colonial empires, as they were the 'peers' charged with assessing whether an entity could enter the League and thus gain recognition as a sovereign state. As Mark Mazower argues, the British supported the formation of the League of Nations "as a way to ratify [the post WWI] territorial dispensation in Europe and safeguard their empire", and 27 years later the US supported the UN's creation to preserve "the Great Power understandings reached during the Second World War."¹⁶⁵ In particular, the Charter preserved the power of colonialist states by placing the Security Council, with its membership dominated by four imperialist powers, in a powerful position. The UN Charter acknowledged the existence of colonial empires, although did offer the relatively loose promise of eventual independence. This was an act of residual imperialism, which as the introductory chapter outlines, was the juridical preservation of imperialism in international law. As Mazower notes, the eventual goal of Articles 75 and 76 of the Charter, which defined the trusteeship system, was not "independence but something far weaker".¹⁶⁶ Even when a postcolonial state gained independence, they entered the UN under the

¹⁶² Anthony Anghie, 'The Evolution of International law: Colonial and Postcolonial realities' (2006) 27 Third World Quarterly 739.

¹⁶³ Coplin n 32; Anne Peters and Simone Peter, 'International Organizations: between Technocracy and Democracy' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of The History International Law* (OUP 2012) 170-197

¹⁶⁴ Article 10 The Covenant of the League of Nations, <http://avalon.law.yale.edu/20th_century/leagcov.asp> accessed 10 November 2013 .

¹⁶⁵ Mazower (n 93) xvi.

¹⁶⁶ *ibid.* 252.

membership criteria set by the formerly colonialist powers. Obtaining UN membership required “a decision of the General Assembly” and more importantly, a “recommendation of the Security Council”, which was dominated by formerly colonialist powers.¹⁶⁷ Article 3 of the Charter explicitly references “original Members of the United Nations”, as distinct from new member states. Thus, on a plain reading of the UN Charter, UN membership continued to reflect colonial era inequalities. As W. E. B. Du Bois, the African-American activist and anti-imperialist, observed in 1945, UN the Charter left “750,000,000 human beings outside the organization of humanity.”¹⁶⁸

Collectively, these inequalities placed postcolonial states’ membership of international organisations on an unequal footing with that of formerly colonialist states. The comparatively weak position of postcolonial states at the UN led to the emergence of the Third World bloc, which provided a mechanism for postcolonial states to project their own interests within international organisations. The term ‘Third World’ was first used in 1952 by Alfred Sauvy, the director of the Institute National d'Etudes Demographiques, and was later popularised by Frantz Fanon in *The Wretched of the Earth*.¹⁶⁹ The precise meaning of the term has been the subject of fierce debate, as it has connotations of underdevelopment and inferiority, and can be used as a semiotic endorsement of Western supremacy.¹⁷⁰ The term also has a political etymology, as postcolonial states voluntarily adopted it to describe a specific communal identity. It is used here, as it accurately captures the shared ideological objectives and political homogeneity of a large number of postcolonial states in the UN General Assembly and other international bodies.¹⁷¹ It gained currency as a political identity after the 1955 Bandung Conference. The final communiqué from the Bandung conference contained an early statement of Third World ideology when it condemned imperialism and called for the independence of territories living under colonial rule. At the conference, the Indian Prime Minister Jawaharlal Nehru stated that “Asia and Africa must play an increasing role in [the

¹⁶⁷ UN Charter Art 4(2)

¹⁶⁸ WEB Du Bois *Writings by W. E. B. Du Bois in Periodicals Edited by Others* Vol 4. Herbert Aptheker (ed) (Millwood, 1982), 2–3.

¹⁶⁹ Bernard Greene, ‘Toward a Definition of the Term the Third World’ (1990) 1 *Boston College Third World Law Journal* 23; Frantz Fanon, *The Wretched of the Earth* (trans. Constance Farrington Penguin Books 1961).

¹⁷⁰ See Arturo Escobar, *Encountering development: the making and unmaking of the Third World* (Princeton University Press, 1995) ch .2.

¹⁷¹ The term Third World is used to describe the grouping of postcolonial states from 1960 until 1993 and then afterwards the term Afro-Asian bloc is used. This tracks the use of this term in the literature on the subject.

UN's] conduct and destiny"; the final communiqué called for postcolonial states' admission to the UN and for an "equitable geographical distribution" of Security Council seats.¹⁷²

In the General Assembly, the Third World bloc came into being after the UN's rapid expansion in the 1960s. On votes relating to independence from colonial rule and action against apartheid South Africa there was a strong level of cohesion between postcolonial states.¹⁷³ Other votes from the Third World bloc either followed regional lines or reflected common positions on issues such as economic development.¹⁷⁴ What linked these different voting positions was anti-imperialism, which was a response to the relative marginalisation of postcolonial states within international law. As Darryl Thomas notes, Third World ideology attempted to challenge the "subservient roles" that postcolonial states had been given through "slavery, colonialism [and] dependency upon the Northwest".¹⁷⁵ Louis Althusser described ideology as "the imaginary relationship of individuals to their real conditions of existence" and resolutions supported by the Third World bloc gave an insight into the bloc's shared ideology.¹⁷⁶ General Assembly resolutions, such as the Declaration for the Establishment of a New International Economic Order, which aimed to eliminate sovereign debt, regulate international corporations and allow states sovereignty over their natural resources was an example of the Third World bloc attempting to develop international law to reflect their ideology.¹⁷⁷

By the late 1970s, a series of international developments – in particular the 1973 Arab-Israeli war – had led to the emergence of a much clearer Third World consensus on a number of issues, which had spread beyond the General Assembly into other international organisations.¹⁷⁸ During the 1980s, Third World solidarity over issues such as apartheid and the protection of each other's sovereignty hardened still further.¹⁷⁹ As Carlos Rangel noted, there were more similarities than differences between states in the Third World bloc, but their shared explanation of vulnerability and defensive approach to their own sovereignty unified

¹⁷² Vijay Prashad, *The Darker Nations: A People's History of the Third World* (The New Press 2007) 41; Final Communiqué of the Asian-African conference of Bandung 24th April 1955, para F1 <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 17 March 2012.

¹⁷³ Eric Voeten, 'Data and analyses of voting in the United Nations General Assembly' in B Reinalda (eds.), *Routledge Handbook of International Organization* (Routledge 2013).

¹⁷⁴ Benjamin Myers, 'African Voting in the United Nations General Assembly' (1966) 4 *The Journal of Modern African Studies* 213; Jack Vincent, 'An Analysis of Caucusing Group Activity at the United Nations' (1970) 7 *Journal of Peace Research* 133.

¹⁷⁵ Darryl Thomas, *The Theory and Practice of Third World Solidarity* (Praeger 2001) 15.

¹⁷⁶ Louis Althusser, *On Ideology* (Verso Books 2008 ed) 36

¹⁷⁷ A/Res 3201 (S-6) 1 May 1974.

¹⁷⁸ *ibid.*

¹⁷⁹ Michael Doyle, 'Stalemate in the North-South Debate; Strategies and the New International Economic Order' (1983) 35 *World Politics* 426.

the group.¹⁸⁰ The Third World bloc declined in the early 1990s, as the strategic logic of collective action in the General Assembly altered with the collapse of the Soviet Union and the realignment of US strategic priorities.¹⁸¹ After the Cold War, the patterns of bloc voting became less clear with only a few states, most notably Laos, Pakistan, Sudan and Syria taking consistent anti-Western stances.¹⁸² Yet the apparent demise of the Third World bloc did not mean that anti-imperial politics ceased, rather, its forms became subtler. The continuation of geographic blocs at the UN meant group or bloc voting was still a feature of international organisations, and African and Asian blocs continued to vote along the same lines on a number of human rights issues. Whilst not a seamless transition between both eras, there was a distinct continuity of anti-imperialism; which as Cedric Grant noted, both looked backward to past injustices, but also tried to create a common cause around equitable and just outcomes.¹⁸³

The Third World bloc was, at its core, united in resistance to the effect that international law had; both in collectively marginalising postcolonial states and in perpetuating the residual advantages of formerly-colonialist states undermining the legitimacy of international organisations in what Nathaniel Berman described as the “delegitimizing effects hypothesis”.¹⁸⁴ This, however, identifies the symptom, not the cause, of collective marginalisation. Much of the literature on the Third World bloc identifies wider macro-economic forces behind the intergroup cohesion.¹⁸⁵ International law’s generation of sovereign inequalities was responsible for many subsequent political and economic incidents of marginalisation. Equally, as Marc Williams argues, there should be some scepticism of the idea that the Third World bloc was solely driven by ideology.¹⁸⁶ Rather the bloc sought to carve out a collective identity in organisations orientated towards continuing the relative power of formerly colonialist states.¹⁸⁷ The relative marginalisation of postcolonial states by international law is evidenced

¹⁸⁰ Carlos Rangel, *Third World Ideology and Western Reality: Manufacturing Political Myth* (Transaction Books, 1986) 43.

¹⁸¹ Mark Berger, ‘After the Third World? History, Destiny and the Fate of Third Worldism’ (2004) 25 TWQ 9, 14.

¹⁸² Eric Voeten, “Clashes in the Assembly” (2000) 54 *IO* 185. See also A Dreher and N Jensen, ‘Country or leader? Political change and UN general assembly voting, *KOF working papers* (2009) <<http://www.econstor.eu/bitstream/10419/50434/1/615006647.pdf>> accessed 10 July 2015.

¹⁸³ Cedric Grant, *Equity in International Relations: A Third World Perspective* (1995) 71 *International Affairs* 567, 569.

¹⁸⁴ Nathaniel Berman ‘Intervention in a “Divided World”: Axes of Legitimacy’ in Charlesworth and Coicaud (n 42) 144.

¹⁸⁵ For examples see Steven David, ‘Explaining Third World Alignment’ (1991) 43 *World Politics* 233; York W. Bradshaw and Jie Huang, ‘Intensifying Global Dependency: Foreign Debt, Structural Adjustment, and Third World Underdevelopment’ (1991) 32 *The Sociological Quarterly* 321

¹⁸⁶ Marc Williams, ‘Rearticulating the Third World Coalition: the Role of the Environmental Agenda’ (1993) 14 TWQ 7

¹⁸⁷ See Mahmood Ayoob, ‘The Third World in the System of States: Acute Schizophrenia or Growing Pains?’ (1989) 33 *International Studies Quarterly* 67

in the writings of the Third World Approaches to International Law (TWAIL) movement. TWAIL, Pooja Parmar argued, intended to insert the “lives and struggles” of Third World peoples into international law.¹⁸⁸ This view is echoed both by early scholars on the Third World; such as A. A. Fatouros, who argued that international law needed to evolve to meet the needs of the Third World; and scholars such as Obiora Okafor, writing over 40 years later, who noted that Third World claims of marginalisation were often caused by international law.¹⁸⁹ This has its ideological limitations, and arguably constrained TWAIL’s ability to advance a distinct alternate vision of international law.¹⁹⁰ This was part of a wider problem facing the Third World movement; it was a political coalition formed in opposition to the imperialist structure of international law. This meant that its collective political ideology was often geared towards opposing the institutions and structures of international law because of their associations with colonial-imperialism. The next part of this section will assess how collective anti-imperialism led to a contradictory position on human rights, and then go on to analyse how anti-imperialism shaped collective institutional opposition from the Third World bloc.

(ii) Third World anti-imperialism and human rights

It is difficult to unpick exactly what happened to the Third World bloc’s position on international human rights law. The Third World bloc initially focused their collective efforts on substantive reform of international human rights law to recognise anti-colonialist concerns. The Bandung Declaration stated that the conference supported human rights and at the conference several delegates spoke in favour of human rights and rights protection.¹⁹¹ The Third World bloc’s first major success in shaping international human rights law was the insertion of the right to self-determination into the ICCPR and the ICESCR. Self-determination was not mentioned in the 1948 Universal Declaration on Human Rights (UDHR). In fact, Article 2 of the UDHR specifically envisaged the possibility of human rights being enjoyed within “trust, non-self-governing [territories] or under any other limitation of sovereignty”, implicitly endorsing the continuation of colonialism.¹⁹² During the drafting of the human rights covenants in 1952, the Liberian delegate to the drafting committee argued that self-determination needed to be included as it “was an essential right” that “stood above all other

¹⁸⁸ Pooja Parmar, ‘TWAIL: An Epistemological Inquiry’ (2008) 10 International Community Law Review 363, 365

¹⁸⁹ A A Fatouros, ‘International Law and the Third World’ (1964) 50 Virginia Law Review 783; Obiora Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both’ (2008) 10 International and Community Law Review 371.

¹⁹⁰ BS Chimni, ‘The World Approaches to International Law: A Manifesto’ (2006) 8 International Community Law Review 3

¹⁹¹ Bandung Communique (n. 161) para C1.

¹⁹² Article 2 (7) Universal Declaration of Human Rights text <<http://www.un.org/en/documents/udhr/index.shtml>> accessed 21 September 2012.

rights.”¹⁹³ The Saudi Arabian delegate argued that the “cry for freedom and liberation from the foreign yoke in many parts of the world” meant that the right to self-determination should be considered the “first right”.¹⁹⁴ Statements such as these seemed to indicate that the right to self-determination was conceived as an interdependent right and would form the basis of subsequent human rights protection.

Another critical early success of the Third World bloc was the rapid advancement of anti-racist measures, which culminated in the 1965 Convention on the Elimination of All forms of Racial Discrimination (CERD). The 1963 General Assembly Resolution on ‘the Elimination of All Forms of Racial Discrimination’ built on the resolution, granting independence to peoples living under colonial rule by tackling the underlying racial discrimination of colonialism, and was strongly supported by states from the Third World bloc.¹⁹⁵ The speed at which CERD entered into force – it took less than four years for enough states to sign up for it to come into force – was indicative of the concerted campaign run by the Third World bloc to ratify the treaty.¹⁹⁶ The CERD specifically referenced apartheid, but not other forms of racism, such as anti-Semitism. When the campaign against apartheid began in the 1950s, it focused on apartheid as an abuse of basic human rights. For example in 1952 and in 1954 the General Assembly condemned apartheid as a form of racial discrimination that was contrary to the “higher interests of humanity”, and authorised the creation of an expert commission to investigate apartheid.¹⁹⁷ Until well into the 1960s, when the Third World bloc was actively pushing anti-apartheid resolutions in the General Assembly, apartheid was framed in terms of a systemic human rights abuse. This was a clear example of the Third World bloc’s willingness to use international human rights law to advance their priorities.

Human rights were clearly important for some of the leaders of anti-colonial independence movements. The Bandung Declaration supported “the fundamental principles of Human Rights” and noted that self-determination was “a pre-requisite of the full enjoyment of all fundamental Human Rights.”¹⁹⁸ In a 1959 speech, Julius Nyrere said that independence was a fight “for our rights as human beings”, and that it was ludicrous to think that after independence Tanzanians were going to turn around and say “to hell with all this nonsense

¹⁹³ U.N. Doc. A/C.3/SR.366 (1951), 115.

¹⁹⁴ UN Doc A/PV.375 (1952), 517–18.

¹⁹⁵ A/Res/1904 (XVIII) 20 Nov 1963.

¹⁹⁶ Theodor Meron, ‘The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1985) 79 AJIL 283, 284.

¹⁹⁷ A/Res 616 (VII) 5 December 1952, A/Res/820 (IX) of 15 December 1954 & A/Res/917(X) 1955.

¹⁹⁸ Bandung Communique (n 161) para C1.

about human rights”.¹⁹⁹ The broader problem came with the institutionalisation of human rights in organisations with protection mandates. As Roland Burke observes, before and after the Bandung conference, representatives from Third World governments displayed little awareness of the “potential antagonism between rights and sovereignty.”²⁰⁰ The strengthening of human rights at the UN, something that had been implicitly advocated in the Bandung Declaration, would lead to the creation of institutions with a wide-ranging focus and the potential to apply their powers to all states, not just formerly colonialist states.

The conceptual relationship between the right to self-determination and the protection of human rights was unclear. When undertaking a closer examination of the decolonisation process, Jan Eckel argues that the “language” of human rights was “marginal”, which he argues reflected Third World state’s “commitment to universal norms as appropriate for their specific anticolonial policies.”²⁰¹ Initially, when postcolonial states applied for UN membership – which was usually the first international act they engaged in after becoming independent – much was made of the importance of self-determination, democracy and the protection of human rights in the discussion of their membership credentials. As Duxbury notes, however, UN membership soon became automatic for postcolonial states as soon as they gained independence, under UN General Assembly Resolution 1514. This signalled the start of the permutation of the right to self-determination from one of many human rights, to being a distinctly anticolonial right independent from other rights.²⁰² Writing in 1962 on the voting patterns of African states at the UN, John Spencer observed that many states had “crossed the divide” from the dynamics of “self-determination”, which focused on fighting oppression; to the preservation of the “status” of the postcolonial state.²⁰³ By the end of the 1960s, the right to self-determination had been detached from other rights, becoming what Burke described as “a one-sided anti-colonial weapon.”²⁰⁴ Samuel Moyn goes further, arguing that anti-colonialism does not really ‘fit’ into the “historiography of human rights” as the right to self-determination that was sought by anti-colonialist leaders, whilst a collective right, was not necessarily interdependent with other human rights or external rights protection.²⁰⁵ Self-determination in Third World ideology is best understood as a remedial right against foreign

¹⁹⁹ Julius Nyerere, “Individual Human Rights” (September 1959) in *Freedom and Unity: Uhuru na Umoja* (London, 1967) 70

²⁰⁰ Roland Burke, *Decolonization and the Evolution of International Human Rights* (U Penn Press, 2010) 25.

²⁰¹ Jan Eckel, ‘Human Rights and Decolonisation: New Perspectives Open Questions’ (2010) 1 *Humanity* 111, 113.

²⁰² Duxbury (n 5) 100.

²⁰³ John Spencer, ‘Africa at the UN: Some Observations’ (1962) 16 *International Organization* 375, 381.

²⁰⁴ Burke (n 199) 58.

²⁰⁵ Samuel Moyn, ‘Imperialism, Self Determination and the Rise of Human Rights’ from Akira Iriye and others (eds.) *The Human Rights Revolution: An International History* (OUP 2012) 160.

colonialism. As Karen Knop explains, “just as private law requires the restoration of wrongfully taken property”, the right to self-determination restored “territory to the rightful owner.”²⁰⁶

Crucially absent in this version of self-determination is any meaningful appreciation of the individual citizens of the state. As Joyce notes, a flaw of colonial independence movements was that they rarely conceived of anything other than the national self and the nation state.²⁰⁷ This understanding of self-determination helps explain one of the puzzles of postcolonial statehood identified by Dunstan Wai, who noted in 1980 that “during the heyday of anti-colonialism and decolonisation the founding fathers of African nationalism emphasised their faith in fundamental human rights.”²⁰⁸ Yet Wai notes that after independence, many African states showed a “clear disrespect for human rights”.²⁰⁹ Self-determination was the end of human rights concerns for many anti-colonial leaders, as human rights existed to combat the evils of colonialism, not to offer wider protection for the citizens in their state.²¹⁰ Once the right to self-determination was decoupled from the protection of human rights more generally, international human rights organisations that exercised their protection mandate over a postcolonial state could be criticised for undermining self-determination – and from there it was relatively easy to conclude that international organisations were attempting a form of imperialist dominance over postcolonial states.

What crucially changed was that after decolonisation, the Third World bloc became ideologically hostile to the idea that sovereignty could be subject to international organisations. This was coupled with the internal fracturing of the Third World bloc, as the post-independence political trajectories of its constituent states began to radically diverge. The formation of the Organisation of African Unity (OAU) saw the emergence of a more extreme form of anti-colonialism, specifically directed against apartheid and white minority rule; which differed considerably from the anti-colonialism of Asian states, which focused more upon political positioning in international organisations rather than direct anti-colonial action. In its first year of operation, the OAU considered launching wars of colonial liberation across Africa and some governments openly discussed an invasion of South Africa.²¹¹ Growing tensions between Asian states – most notably between Malaysia and Indonesia – and the crisis

²⁰⁶ Karen Knop, *Diversity and Self-Determination in International Law* (CUP, 2002) 69.

²⁰⁷ Joyce (n 19) 21.

²⁰⁸ Dunstan M Wai, ‘Human Rights in Sub-Saharan Africa’ in Admantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (New York 1980) 115.

²⁰⁹ *ibid*

²¹⁰ See Andrea Eckhart, ‘African Nationalists and Human Rights 1940s-1970s’ in Stefan-Ludwig Hoffmann (eds.) *Human Rights in the Twentieth Century* (CUP 2011) 295-9.

²¹¹ See C.J. Dugard, ‘The Organisation of African Unity and Colonialism: An inquiry into the Plea of self Defence as a Justification for the use of Force in the eradication of colonialism’ (1967) 16 ICLQ 157.

over East Pakistan in the early 1970s led to a breakdown in relations among some of the key states in the Third World bloc.²¹² What continued to provide ideological cohesion between the bloc was anti-imperialist resistance to the perceived power of formerly colonialist states at the UN. This was apparent in issues relating to the protection of human rights. David Kay noted in 1967 that for the Third World bloc the UN's human rights policy had become "but another vehicle for advancing their attack on colonialism."²¹³ Mark Berger goes further, arguing that from the late 1960s onwards, the common consensus over the condemnation of all "manifestations of colonialism" drove the Third World bloc's commitments on human rights.²¹⁴ By the beginning of the 1970s anti-apartheid resolutions, reflecting this began to refer to apartheid less in terms of a human rights abuse and more in terms of a neo-colonial injustice; by 1978 only a third of anti-apartheid General Assembly resolutions contained a reference to human rights or human rights law.

Perceiving the existence of a unified Western power structure operating against postcolonial states and peoples was an essential feature of postcolonialism's intellectual project. As Cheryl McEwan argues, what unified a diverse intellectual movement was postcolonialism's reference to a common "commitment to challenging [the] cultural hegemony" of the former colonial powers.²¹⁵ This meant that what unified postcolonial politics was its challenge to the existing Western dominated structures of power. As Mahmoud Hussein argued, this meant that when it came to human rights postcolonial states contrasted "their identity to that of others, by rejecting, helter-skelter, everything they saw as being essentially Western."²¹⁶ Many advocates of universal rights have noted that conceptions and traditions of rights exist in many different societies and that these underpin human rights instruments.²¹⁷ Whilst an interesting proposition about the theoretical underpinnings of human rights (of which there is more discussion in the next chapter); when postcolonial states acted in international organisations, universal rights were attacked as being part of a Western legal hegemony, which in other areas was responsible for the marginalisation of states, as described in the first part of this section. Apart from a common desire to pursue decolonisation, the one thing uniting

²¹² Guy Parker, 'The Rise and Fall of Afro Asian Solidarity' (1965) 5 *Asian Survey* 424.

²¹³ David Kay, 'The Politics of Decolonization: The New Nations and the United Nations Political Process' (1967) 21 *IO* 786, 796.

²¹⁴ Berger (n 181) 12.

²¹⁵ Cheryl McEwan, *Postcolonialism and Development* (Routledge 2009) 35.

²¹⁶ Mahmoud Hussein, "Versant sud de la liberté: Essai sur l'émergence de l'individu dans le tiers monde"; in Stephen Marks 'From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution' (1998) 20 *HRQ* 459, 463.

²¹⁷ See specifically Bertrand Ramcharan, 'The Universality of Human Rights' (1997) 58 *International Commission of Jurists Review* 105. See generally Heiner Bielefeldt, "Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 2 *Political Theory* 90.

postcolonial states within international organisations was their shared marginalisation by the structures of international law. This exacerbated standard patterns of institutional opposition and, as the next part of this section argues, led to the Third World bloc situating international organisations as a collective imperial other, which they had to guard against.

(iii) Anti-Imperialist Institutional opposition

Anti-imperialist institutional opposition was an extreme form of institutional opposition built upon two assumptions: firstly that the juridical weaknesses of postcolonial states meant that their sovereignty was exceptionally vulnerable. Secondly, there was a common ideological sentiment between states in the Third World bloc that human rights were designed to remedy aspects of colonialism in international law, not protect the rights of individuals within states. There is no reason that human rights can't fulfill both objectives – the grant of self-determination both protected individuals' democratic rights and remedied aspects of colonial-imperialism – but the Third World bloc's anti-imperialist institutional opposition maintained that the two things were mutually exclusive. As such, they implicitly, and in some cases explicitly, maintained that international human rights law should be concerned with attacking colonialism. The following are illustrations of four major ways that anti-imperialist institutional opposition manifested itself.

Firstly, there was the general reluctance displayed by many states to following institutional procedures for assessing human rights compliance, which was framed as a consequence of inequality or underdevelopment on the part of Third World states. The majority of states that had late or delayed reports were from the Third World bloc, and as Ann Bayefsky noted in her 1994 study of state reporting, Africa was the region with the most overdue reports.²¹⁸ In 2010, the HRC singled out the Gambia and Equatorial Guinea for delaying reporting for over 20 years, and over half of the states that it identified as having delayed reports for over five years or more were states from the African and Asian bloc's.²¹⁹ This even spread outside the reporting procedure. Sarah Joseph noted this in her study of HRC's emergency procedures; Sudan, Zaire and Angola were particularly unresponsive to the HRC, and refused to cooperate with it when it was concerned about mass human rights abuses taking place in their

²¹⁸ Anne Bayefsky, 'Making the Human Rights Treaties Work' (1995) 26 *Studies in Transnational Legal Policy* 229.

²¹⁹ CCPR (2010) (Vol.1) UN Doc A/65/40.

jurisdiction.²²⁰ Farrokh Jhabvala notes that the HRC did not seriously consider the socio-economic conditions of many states and how this may impact their ability to protect civil and political rights, a problem exacerbated by the separation between the ICCPR and the ICESCR.²²¹ A similar point was raised by Angola when the HRC found in *Marques v. Angola* that their defamation laws violated the ICCPR. The Angolan government did not respond to the decision and in the words of the HRC “failed to address the violations ... [or] acknowledge the Committee’s findings.”²²² When asked by a special rapporteur about their failure to respond, a representative from the Angolan government said that they had “limited capacity” to deal with the human rights concerns raised by their citizens.²²³ It is difficult to disentangle potentially justified claims of sovereign inequality from Third World states from a wider culture of opposition to any human rights organisation. However, as Bayefsky notes, the majority of the states that resisted reporting to treaty review bodies were serial human rights abusers and had little problem committing economic resources towards repression in their own jurisdiction.²²⁴ Whilst this is a somewhat cynical comment, it is a response to what was often a somewhat cynical argument advanced by states – such as Zaire and Angola – as a means of evading their obligations, rather than requesting assistance to improve their human rights capacity.

Secondly, there was an increased hostility towards mechanisms that would encourage individual petition, which fused concerns about the ipsetic power of organizations with anti-colonialism. Delegates from Ghana, Nigeria and the Philippines led Third World bloc support for the formation of a Committee on Racial Discrimination with a right to individual petition, and there was a broad agreement on the principle of allowing individual petitions in relation to abuses. This did not, however, equate to support for an individual petition mechanism for the ICCPR.²²⁵ Some delegates from the Third World, such as George Lamptey (the Ghanaian diplomat), supported the creation of an individual petition and attacked states – such as Tanzania and the United Arab Emirates – who, in Burke’s words, “sought to limit the right to petition to colonial territories” and allow it nowhere else.²²⁶ As the Tanzanian government’s representative indicated to the ICCPR’s drafting committee, whilst “newly independent

²²⁰ Sarah Joseph, ‘New Procedures Concerning the Human Rights Committee’s Examination of State Reports’ (1995) 13 *Netherlands Human Rights Quarterly* 5.

²²¹ Farrokh Jhabvala, ‘On Human Rights and the Socio-Economic Context’ from Frederick Snyder and Surakiart Sathirathai (eds.) *Third World Attitudes Toward International Law: An Introduction* (Martinus Nijhoff 1987).

²²² *Marques v. Angola*, Case No. 1128/2002 UN Doc A/61/40 at 686.

²²³ Open Society Justice Initiative, *From Judgement to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundation, 2010) 124.

²²⁴ Bayefsky (n 217).

²²⁵ Burke (n 195).

²²⁶ *ibid.* 72.

Countries had to ensure respect for the rights of the individual”, their principal concern was “above all was the security of the state” which was defined as protection from outside, or neo-colonial interests.²²⁷ This also led to opposition to the creation of new mechanisms for protecting human rights. In 1977, Patrick Flood noted that Third World bloc states opposed the creation of a High Commissioner for Human Rights, after Soviet countries lobbied them “[playing] on ... sensitivities concerning their colonial past [in order] to portray the High Commissioner proposal as neo-colonial Trojan Horse.”²²⁸ This demonstrated that a wider fear of neo-colonialism could also serve as a rallying point for the Third World bloc against protection mandates of any kind. This attitude persisted and in the 1980s, Manfred Nowak noted that despite the growing international consensus over the prevention of torture many states from the Third World bloc actively opposed the Committee Against Torture.²²⁹

Thirdly, pre-emptive anti-imperialist institutional opposition helped form regional organisations that were distinctly anti-colonialist but lacked effective protection mandates. The Arab League’s 2008 Arab Charter on Human Rights (the Charter) is an interesting example of anti-imperialist pre-emptive opposition. Early attempts by the Arab League to draft a human rights charter were driven by anti-colonialism and solidarity with Palestinian refugees; this was often the only area of agreement on human rights issues at Arab League summits.²³⁰ The 2008 Charter references the importance of “self-determination” and singles out “foreign occupation and domination” as a force that needs to be condemned and resisted.²³¹ It is also the only human rights instrument to translate these obligations into a positive provision in Article 2(4), which states, “all peoples have the right to resist foreign occupation”.²³² Yet, as Mervat Rishmawi observes, the Charter contains numerous constraints on the “effective access to justice for victims”.²³³ The Charter contains several provisions to allow states to derogate or suspend rights, open-ended restrictions on the limitations of rights and other provisions all designed to create a seemingly wide margin of appreciation for state parties. When, in 2014, the Arab League announced that they had secured agreement on the creation of an Arab Court of Human Rights, human rights activists from Arab states dismissed it as a paper court as it

²²⁷ *ibid.* 76.

²²⁸ Patrick Flood, *The effectiveness of UN human rights institutions* (Greenwood Publishing Group 1998) 120.

²²⁹ Nowak, ‘The Attitude of Socialist States towards the implementation of UN Human Rights Conventions’ (1987) 6 *Netherlands Human Rights Quarterly* 85.

²³⁰ For an overview see Abdullahi An-Na’im, ‘Human Rights in the Arab World: A Regional Perspective’ (2001) 23 *HRQ* 701.

²³¹ Arab Charter on Human Rights 2004, Article 3

<http://www.cartercenter.org/resources/pdfs/peace/democracy/des/revised_Arab_charter_human_rights.pdf> accessed 10 December 2012

²³² *ibid.*

²³³ Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward* (2005) 5 *HRLR* 361.

would only allow inter-state actions, not a right of individual petition.²³⁴ Implicit within the Arab Charter is the assumption that colonialism is the principle cause of human rights abuses, and the sovereignty of the state over its citizens needs to be safeguarded.

Fourthly, institutional opposition from the Third World bloc was often characterised by a collective solidarity within the bloc, which protected individual postcolonial states from an organisation operating its protection mandate over individual Third World states. This could appear in a number of different guises. Firstly, it involved attacking external enemies as imperialists to deflect attention from states within the Third World bloc. The separation of human rights from the anti-apartheid campaign led to the association in 1974 of Zionism and apartheid in a General Assembly resolution on the elimination of all forms of racial discrimination.²³⁵ In its purest form, Zionism could be racist, but the direction of the resolution associating the two was aimed at attacking Israel. During the First World Conference on Racism in 1978, this had morphed into a general anti-Israeli position. In 2001, at the Second World Conference on Racism in Durban, the Third World bloc blocked consideration of racist practices within postcolonial states and the discussion centred on Israel's racist policies; whilst ignoring the racism that was taking place in Afghanistan, Saudi Arabia, Sudan and Zimbabwe.²³⁶ The second form of collective solidarity involved attacking international law more directly. When Arab states were criticised for filing excessive reservations to the Convention on the Elimination of all Discrimination Against Women, including reservations that would effectively emasculate its review body, Belinda Clark noted that "the issue was portrayed... as an attack on Third World countries by Western countries" which led many states from the Third World bloc to rally to the support of Arab states.²³⁷

Conclusion

Institutional opposition is a by-product of a tension within the post-1945 sovereignty. On the one hand, in order to maintain legitimate external sovereignty it is important to respect human rights and join international legal regimes demonstrating that commitment. As Jürgen Habermas argues, respect for human rights is an important mechanism for a state to claim that both their citizens and other actors ought to recognise their claim to sovereignty and

²³⁴ Joe Stark, 'New Arab Human Rights Court is Doomed from the Start' Human Rights Watch, <<https://www.hrw.org/news/2014/11/26/new-arab-human-rights-court-doomed-start>> accessed 26 November 2014

²³⁵ A/Res 3379 10 Nov 1975.

²³⁶ Tom Lantos, 'The Durban Debacle: An Insider's View of the UN World Conference Against Racism' (2002) 26 *The Fletcher Forum of World Affairs* 22.

²³⁷ Belinda Clark 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *AJIL* 281, 284.

respect their law-making capacity as a sovereign.²³⁸ However, domestic sovereignty, since at least the seventeenth century, has been defined in positivistic terms, by the capacity of a government to be the legitimate and sole lawmaker over a defined territory.²³⁹ International human rights organisations, due to the legal structure of their protection mandates and the wider political context of their operation, can become a competing or rival sovereign as they are able to make an authoritative claim as to what the law of a state ought to be. As the second section of this chapter argued, this can be described as an ipsetic potential, as it describes how an organisation's protection mandate cumulatively gives the organisation a self-hood that allows it to make a legitimate claim to sovereign authority in the area of human rights protection. This creates institutional opposition, as the state attempts to symbolically reassert their sovereign power. This is inevitable, and does not necessarily pose a threat to an international organisation, but more extreme forms of institutional opposition pose a definitive threat to international organisations' capacities to protect human rights. A good example of this is pre-emptive institutional opposition, where states create organisations without effective protection mandates; so that they can externally appear concerned with human rights protection, whilst in actuality not being subject to a protection mandate.

As the third and final section of this Chapter sets out, the juridical inequalities between the sovereignty of postcolonial states and formerly colonialist states meant that collective institutional opposition from the Third World bloc was underpinned by anti-imperialism. Anti-imperialist institutional opposition broadly maintained that human rights organisations posed a threat to the sovereignty of postcolonial states (because of juridical inequalities), and that formerly colonialist states were the source of human rights abuses and therefore the appropriate subject for the attention of a human rights organisation's protection mandate. The persistence of anti-imperialist institutional opposition at the regional level, which will be examined further in chapter four with an analysis of the African Human Rights system, seems to indicate that it is not just the colonial-imperial context of international law that generates anti-imperialist institutional opposition. The core factor behind anti-imperialist opposition, chapters three and four demonstrate, is the presence of protection mandates. What the final chapter of this study argues is that protection mandates are in and of themselves inherently imperialist, which explains why organisations that operate outside of the colonial-imperial context of international law will still face anti-imperialist opposition. The next chapter examines ideological opposition, and considers the potential for international human rights

²³⁸ Jurgen Habermas, 'Remarks on legitimation through human rights' (1998) 75 *Modern Schoolman* 87.

²³⁹ See David Held, *Political Theory and the Modern State* (J Wiley & Sons, 2013) 14-17 for a concise summary of the literature arguing this point.

law to be decolonised. Whilst it is possible to decolonise international human rights law, as the next chapter argues, it is not possible to decolonise the protection of international human rights by an organisation which, as chapter five argues, is inherently imperialist.

CHAPTER TWO

Ideological opposition and anti-imperialism

Introduction

Institutional opposition, which was described in chapter one, is opposition that responds to an organisation's protection mandate. A protection mandate collectively describes the legal powers an organisation has to enforce international human rights law, which allow the organisation to assert sovereign competences in the area of human rights protection. This is an ipseitic potential, as it describes the capacity of an organisation to make a claim as to what the law in a particular state ought to be. All states engage in some degree of institutional opposition as a reaction to the ipseitic potential of an organisation's protection mandate. Due to the sovereign inequalities between formerly colonialist states and postcolonial states, collective opposition from postcolonial states in the Third World bloc was underpinned by anti-imperialism. As the introductory chapter outlined, imperialism is best understood as a relation of dominance that intentionally subordinates sovereignty to an external power and therefore anti-imperialism describes the actions of states, groups and individuals resisting this dominance. Ideological opposition is different: it is opposition (state non-compliance, a political campaign against the organisations protection mandate or outright attacks on a human rights instrument) based upon a specific philosophical objection to the international human rights law applied and enforced by a supranational human rights organisation.

International human rights law refers collectively to the major international human rights treaties, some of which have been codified in the 1948 Universal Declaration of Human Rights (UDHR). These include the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) - collectively known as the International Human Rights Bill.¹ Whilst states living under colonial rule only had a minimal involvement in the UDHR's creation, many had considerable involvement in the creation of subsequent human rights treaties.² Some of these treaties, most notably the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), were the direct product of Third World campaigns on international

¹ Office of the United Nations High Commissioner for Human Rights 'Monitoring the core international human rights treaties' <<http://www2.ohchr.org/english/bodies/treaty/index.htm>> accessed 20 February 2012.

² Roland Burke, *Decolonization and the Evolution of International Law* (Universi Pennsylvania Press 2009) 69- 87.

law reform.³ However, one important development, which occurred before many postcolonial states became independent, was the separation of the two human rights covenants. Economic and social rights were confined to the much weaker legal framework of the ICESCR, which only required states to "progressively" realise economic and social rights, rather than prevent violations of rights.⁴ This was at the specific instigation of the US and was the first move in a much wider campaign to divorce material concerns from international human rights law.⁵ By the late 1970s, the vast majority of post-colonial states were members of the UN, and were able to actively participate in the formation and drafting of agreements, such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1984 Convention against Torture (CAT). In total, international human rights law consists of nine treaties, and alongside these treaties, the International Criminal Court (ICC), which enables the prosecution of systematised human rights abuses in the form of crimes against humanity.⁶

These treaties oblige signatory states to follow their terms as a matter of international treaty law. The Human Rights Committee (HRC), the treaty review body of the ICCPR, has interpreted this as meaning that all levels of government are bound by the terms of a human rights treaty and are required to make "such changes to domestic laws and practices as are necessary" to comply with the ICCPR.⁷ Jack Goldsmith and Eric Posner note human rights treaties rarely have any independent effect on the behaviour of countries as they tend to align with internal domestic political norms.⁸ Human rights enforcement can also utilise UN structures or *jus cogens* norms. The UN Charter requires member states to work towards promoting "universal respect for and observance of, human rights".⁹ However, organs of the UN – such as the Security Council – were dominated by formerly colonialist states, which added to the perception that the enforcement of international human rights law by the UN was an attempt by former colonialist states to mask an imperialist power grab.

³ *ibid.*

⁴ ICESCR 1966 UNTS Vol. 993, 3.

⁵ Daniel Whelan, *Inadvisable Human Rights: A History* (Uni Penn Press, 2010) ch 6.

⁶ These Nine treaties are: 1951 Refugee Convention, 1965 Convention on the Elimination of Racial Discrimination, ICCPR, ICESCR, CEDAW, CAT, 1989 Convention on the Rights of the Child, 2006 Convention on the Rights of Persons with Disabilities, 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

⁷ CCPR Human Rights Committee General Comment No. 31 *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 05/26/2004, CCPR/C/21/Rev.1/Add.13, para. 12.

⁸ Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2005) 110-111.

⁹ Olivier De Schutter, *International Human Rights Law Cases, Materials, Commentary* (CUP 2010) 49.

Jus cogens are the principles of international law, which, as the International Court of Justice (ICJ) held in the *Reservations to the Genocide Convention Case*, are “binding on states, even without any conventional obligation.”¹⁰ There are some rights – in particular the prohibition on slavery, torture and discrimination – that international courts have considered *jus cogens* because of the history and tradition of international legal practice.¹¹ This implicitly referred to a colonial history and tradition of international law. Regardless of the importance of *jus cogens*, their creation occurred in an international environment where there were no postcolonial states. World War II and the Holocaust led to a cultural sense of guilt, which was located in the experience of European states and Western powers. As many *jus cogens* norms emerged from this experience, the process of norm creation located human rights within a European experience.¹² There was some evidence of Euro-centrism in early international human rights law. For example, Article 30 of the UDHR – a rights abuse clause, designed to prevent totalitarian political groups gaining political power – reflected concerns that were chiefly European, and it was included in the ICCPR because European states argued for its inclusion during the drafting process.¹³ A distinct concern of postcolonial states, which was not adequately protected in international human rights law, was protection for the material conditions of states. Given the systemic underdevelopment of many postcolonial states and the role colonial-imperialism played in generating underdevelopment, this could be seen as evidence of international human rights law’s imperialism.

Anti-imperialist ideological opposition emerged as a reaction to the imperialist context within which international human rights law emerged and was used. The introductory chapter noted the distinction between imperial context and inherent imperialism. International human rights law was contextually imperialist because of its origins and application, but this context did not preclude its potential decolonisation. Walter Mignolo defines decolonialism as a way of thinking that “delinks from the chronologies” of existing modes of thought, and tries to find a “common ground or vision of the future.”¹⁴ Ramón Grosfoguel argues that decolonial epistemology would challenge the “coloniality of

¹⁰ *Reservations on the Convention on Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951), 15.

¹¹ Bertrand Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff 2011) 28-31.

¹² This argument is made by Shelly Wright, *International human rights, decolonisation and globalisation: becoming human* (Routledge 2001) ch 2.

¹³ Hans Cannie and Dirk Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An added value for Democracy and Human Rights protection?’ (2011) 29 *Netherlands Quarterly of Human Rights* 54, 56-58.

¹⁴ Walter Mignolo, ‘Geopolitics of Sensing and Knowing: On De(Coloniality) Broader Thinking and Epistemic Disobedience’ (2011) 14 *Postcolonial Studies* 273, 274.

power/knowledge”, by seeing the global system from the subaltern perspective and reshaping the international order accordingly.¹⁵ Anti-imperialist ideological opposition sometimes pursued a decolonial project; as states from the Third World bloc sought to advance a radical project in areas such as economic development and the protection of culture, that aimed to reprioritise the substance of international human rights law. As will be shown towards the end of this chapter, anti-imperialist ideological opposition also involved states making claims that any form of international human rights law was either part of a wider imperialist hegemony or incommensurable with their own cultures. These arguments were used in international organisations as a mechanism to deflect scrutiny of the human rights records of some states, or to justify human rights abuses. This was far from a decolonial approach to human rights, and as Grosfoguel notes, the decolonial is “critical of both Eurocentric and Third World fundamentalisms”.¹⁶ Mignolo also picks up this theme, arguing that the problem with existing forms of de-westernisation or anti-colonial politics was their failure to “question the ‘civilization of death’ hidden under the rhetoric of modernization”.¹⁷ What this chapter does is give an overview of anti-imperialist ideological opposition, and demonstrate that whilst it is possible to decolonise international human rights law and address the imperialist context of its formation, the protection of international human rights by organisations remains imperialistic.

This chapter defines ideological opposition and then outlines the different ways in which international human rights law can be considered imperialist, and shows how this influenced anti-imperialist ideological opposition. The first section of this chapter analyses the nature of ideological opposition, by assessing the dominant ideology of international human rights and why states having divergent philosophical views about the substance of human rights and what they should protect leads to opposition. The ideology of international human rights law is different from the way that international human rights law can be used in service of an ideology. These two different definitions of ideology provide the framework for the second section, which analyses why international human rights law can be considered imperialist. International law originated in the era of colonial-imperialism, and the subsequent construction of international human rights law at the UN was dominated by formerly colonialist states, which meant that its content reflected an imperialist ideology. When the idea of universal human rights was used to justify acts of neo-imperialism, such as the policy

¹⁵ Ramón Grosfoguel, ‘The Epistemic Decolonial Turn’ (2007) 21 *Cultural Studies* 211, 212.

¹⁶ *ibid* 212.

¹⁷ Walter Mignolo, ‘Epistemic Disobedience, Independent Thought and De-Colonial Freedom’ (2009) 26 *Theory, Culture & Society* 1, 3.

of humanitarian intervention, this toxified the idea of human rights and subsequently shaped attitudes towards international human rights law. In the final section of this chapter, the three main strands of anti-imperialist ideological opposition from the Third World bloc – developmentalism, anti-hegemonic opposition and defensive relativism – are analysed, and are each illustrated by reference to a specific case study focusing on an organisation or type of right. These were a reaction to the imperial ontology of international law; they were driven by the apparent imperialism of human rights law, but also made claims to reprioritise the substance of international human rights law. However, in practice the principal concern behind these strands of opposition was not the re-prioritisation of the content of international human rights law, but protection of the sovereignty of the postcolonial state from human rights organisations.

As subsequent chapters demonstrate, anti-imperialist opposition to human rights organisations was minimally ideological and more concerned with protecting postcolonial states' sovereignty. Chapter three, through an analysis of opposition from the Third World bloc at the UN Commission on Human Rights, shows how campaigns for the reprioritisation of international human rights law played a relatively minor role in the Third World bloc's anti-imperialist opposition, and defending sovereignty was a much greater priority. As chapter four argues, the Third World campaigns for the ideological reprioritisation of human rights law described in this chapter shaped the African Charter of Human and Peoples Rights, which was a genuinely decolonial human rights instrument. However, it had an enforcement mechanism that triggered pre-emptive anti-imperialist opposition. The core thesis of this study is that anti-imperialist opposition persisted against institutions created by postcolonial states outside of the colonial-imperial frameworks of international law because the legal structure of a protection mandate is inherently imperialist. It envisages the creation of a 'human rights violating state', which is necessary to justify its ipseitic potential, and replicates the process used by colonial-imperialism. As outlined in section two of this chapter, and developed further in chapter five, colonial-imperialism created an alterity, or other, in order to define the values of civilisation. In a similar manner, the legal structure of a protection mandate, chapter five argues, creates the categories of human rights violating and human rights compliant states. This pressures states into compliance with human rights organisations, because, as outlined in the previous chapter, adherence to international human rights law is a mechanism for a state to demonstrate that it conforms to the 'global

script of legitimacy'.¹⁸ The persistence of anti-imperialist opposition highlights how it is difficult to separate supranational protection of human rights from imperialism; whilst it is possible to decolonise international human rights law, it is not clear that the protection of human rights can be decolonised.

(1) What is ideological opposition?

Ideological opposition occurs because the foundations and content of human rights are politically contested, and are rooted in particularist traditions; subsequent promotion and enforcement of human rights by international organisations is therefore open to challenge on the basis that they represent a particular ideology. "The modern language of rights", John Finnes notes, has created a "potentially precise instrument for sorting out and expressing what one perceives to be the demands of justice."¹⁹ The normative foundations and subject matter of these instruments are open to contestation, as international human rights law has developed instruments aiming towards increasingly precise conceptions of justice in a world of competing traditions of justice. The conflict between different notions of justice is not just an abstract conflict, Joseph Raz argues; as "human rights are there to be enforced", they explicitly require international human rights organisations to "acknowledge the soundness or condemn the unreasonableness or immorality" of particular laws and practices in states by reference to human rights law.²⁰ This process involves making a set of ideological choices about which rights to protect and enforce that, as Jean Luc-Nancy notes, is itself a form of "latent" ideology.²¹ The legal structure of a human rights instrument, by including some rights and excluding others, envisages a limit for human autonomy and human choices, giving international human rights law a distinctly ideological dimension.

There are two important distinctions between ideological opposition and institutional opposition discussed in the last chapter. Firstly, ideological opposition is not a reaction to organisational power, or necessarily a defence of state sovereignty. It is perfectly possible for a state to accept a human rights organisation's capacity to override their sovereign authority while still entertaining fundamental disagreements over the rights that the organisation in question is protecting. Secondly, whilst the discussion of ideological opposition often focuses on a west versus non-west conflict, it is a mistake to assume this is the only dimension of ideological conflict. The fact that there are more instances of ideological opposition coming

¹⁸ Jack Donnelly, 'Human Rights: A New Standard of Civilization' (1998) 74 *International Affairs* 1.

¹⁹ John Finns, *Natural Law and Natural Rights* (1980) 210.

²⁰ Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Law Review* 31, 46.

²¹ Jean Luc-Nancy, 'On human rights: two simple remarks' in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (CUP 2014) 16.

from states in the Third World bloc (latter the Afro–Asian bloc) reflects the dominant ideology of international law, which was rooted in colonial-imperialism. It is not evidence that ideological opposition is the sole purview of postcolonial states. Both postcolonial and formerly colonialist states can have ideological disagreements with the content of international human rights law and oppose human rights organisations on this basis. Equally, both sets of states can find areas of common ideological agreement in international human rights law.²²

To understand ideological opposition, it is first necessary to understand that membership of a human rights organisation does not indicate an agreement with the entire content of international human rights law. Ryan Goodman and Derek Jinks' acculturation theory maintains that states agree to be bound by and comply with international human rights law not because they agree with its content, but because they are socialised through relations with other states into compliant behaviour.²³ Acculturation, Goodman and Jinks argue, should be differentiated from persuasion, which involves "assessment of the content" of the human rights message, as acculturation occurs "not as a result of the content of the relevant rule or norm but rather as a function of social construction."²⁴ As Goodman and Jinks have noted elsewhere, there are several empirical studies supporting the growth of acculturation.²⁵ One of the most significant is Kathryn Sikkink's analysis of socialisation among emerging democracies in Latin America in the early 1990s. Sikkink's analysis emphasises the role the Inter-American Human Rights Commission played in working with other social actors to assist democratic transitions in countries such as Argentina.²⁶ This is similar to ideational theories of international human rights law, which maintain that states commit to international human rights treaties as a means of positioning themselves alongside other states.²⁷

Under the acculturation model, when a state signs up to a human rights treaty that makes them a member of a human rights organisation, this can reflect a genuine agreement over the protection of some rights. However, it can also represent a pragmatic acceptance, a

²² Daniel Bell outlines this argument – Daniel Bell, 'Which Rights are Universal?' (1999) 27 *Political Theory* 849.

²³ Ryan Goodman and David Jinks, *Socializing states: Promoting Human Rights Through International Law* (OUP, 2013) 25-6.

²⁴ *ibid* 29.

²⁵ Ryan Goodman and David Jinks, 'Social mechanisms to promote international human rights: complementary or contradictory?' in Tomas Risse, Samantha Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP 2013) 105-6.

²⁶ Kathryn Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) 47 *IO* 441.

²⁷ For an outline of this theory see Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *IO* 217.

reluctant compliance or outward acquiescence (but inward non-compliance) on the part of that state. Equally, acculturation does not eliminate domestic particularities; as Anthony Langlois observes, the consensus behind international human rights law exists “at the level of international politics” and is “neither derived from nor easily transposable” onto the ethical traditions that exist “‘below’ the international regimes of human rights.”²⁸ This needn’t be too problematic when it comes to organisational membership, because, as Neil Walker argues, different parties “who invest in the language and institutions of universal human rights [can] come to find common justificatory ground and influence the shared or overlapping meaning attached to human rights.”²⁹ Yet this assumes a reasonably symmetrical bargaining process within organisations, and does not acknowledge that the language of universal rights, by virtue of its ontological basis in the European enlightenment, is to an extent socially contingent. As Costas Douzinas notes, rights are the basic “building bloc of Western law” and can preclude claims or demands from certain groups.³⁰ This often makes the language and institutions of international human rights law an imperfect tool for balancing different states’ competing claims about justice. Thus, membership of a human rights organisation is not the end, but often the beginning, of debates about the content and foundations of human rights. Ideological opposition is triggered when states believe their own ideological position about the content of human rights is not being recognised or registered by an organisation and therefore, through a process of opposition, they present their own ideological version of what international human rights law ought to protect.

As many instances of ideological opposition are either directed at the Western ideological features of human rights or its position as an ideology with existing power structures, it is easy to ignore two crucial features pertaining to the structure of human rights law that generate ideological opposition. Firstly, the content of international human rights law – which human activities, needs or desires are protected and codified as rights – is a political question. As Michael Perry argues, an “international human rights document represents a particular view” of what “it is right or wrong to do or not to do”, but the criteria by which “right” or “wrong” are established in a human rights instrument has to be subject to some form of agreement.³¹ Claiming rights are “fundamental”, as both the preambles of the UDHR and ICCPR do, does not resolve the question of *which* rights are fundamental. Theodore

²⁸ Anthony Langlois, ‘Human Rights: The Globalisation and Fragmentation of Moral Discourse’ (2002) 28 *Review of international Studies* 479, 487.

²⁹ Neil Walker, ‘Universalism and particularism in human rights’ in Cindy Holder and David Reidy *Human Rights: The Hard Questions* (CUP, 2013) 39, 51.

³⁰ Costas Douzinas, ‘The poverty of (rights) Jurisprudence’ from Conner Gearty and Costas Douzinas *The Cambridge Companion to Human Rights Law* (CUP 2012) 56, 73-75.

³¹ Michael Perry, *The Idea of Human Rights: Four Inquiries* (OUP 1998) 44.

Meron notes in his analysis of ICJ judgements involving human rights that whilst for some “due process rights are fundamental and indispensable”, for others the right to food would take precedence.³² Meron goes on to note that the ICJ’s jurisprudence suggests that “a fundamental right must be firmly rooted international law”, and that “claims or goals” would not qualify for recognition as fundamental rights or as a *Jus Cogens* principle. Therefore, some rights would have to be designated universal, whereas others would not. As Wade Mansell and Karen Openshaw conclude, human rights can “never be a politically neutral concept”, and arguments about the content of human rights are often subject to the “economic interests and ideology” of those “making or rejecting demands in connection with such rights.”³³

The politics surrounding the US’ ratification of the ICESCR illustrates the way competing ideologies about what rights are affect international human rights law. Although President Franklin Roosevelt had used the language of rights to highlight the importance of economic and social security in the 1940s, the US was influential in the separation of the two human rights covenants (see below), and by the 1970s there was active hostility from the US to the concept of economic and social rights. Whitehouse documents from the 1970s show officials insisting that “pet projects” must not be named human rights and that human rights should be kept “to mean human rights” – shorthand for a limited conception of civil and political rights.³⁴ Later documents contained instructions that the US government needed to move to “another label for economic and social progress” that did not involve the term rights.³⁵ At hearings of the US Senate on ratifying the ICESCR, economic conservatives, reflecting the dominant ideological trend in US politics, argued that economic and social rights were antithetical to the free market. In 1988, the Deputy Assistant Secretary of State of the Reagan administration argued that it was a “myth” that economic and social rights were in fact human rights.³⁶ These remarks came less than a year after the establishment of the Committee of Economic, Social and Cultural Rights, the ICESCR’s treaty body, and were indicative of wider US ideological opposition to using international human rights law to protect material conditions.

³² Theodore Meron, ‘A Hierarchy of Human Rights’ (1986) 80 AJIL 1, 11.

³³ Wade Mansell and Karen Openshaw, *International Law: A Critical Introduction* (Hart Publishing 2013) 135.

³⁴ Hauke Hartman, ‘US Human Rights Policy under Carter and Reagan 1977-1981’ (2001) 23 HRQ 402.

³⁵ *ibid.*

³⁶ Daniel Whelan, ‘The United States and Economic and social rights: Past, present ...and future? *Human rights & human welfare working papers*, No .26 (2005) 12 <http://www.du.edu/korbel/hrhw/workingpapers/2005/26-whelan-2005.pdf> accessed 6 June 2015.

Secondly, the universality of international human rights law is open to the criticism that it is a series of practices grounded in a particular culture that have been exported universally, and as a consequence lacks a truly universal epistemological grounding. To some extent, this is inevitable; as Peter Fitzpatrick argues, the universal does not exist in abstract, and the rights that are claimed as universal necessarily “correspond to some particular practice somewhere.”³⁷ In a similar vein, Judith Butler argues that claims of universality are bound by “various synaptic stagings with culture”, which make it impossible to separate features of any one given culture from a universalist claim.³⁸ Much attention has been given to common conceptions of dignity that intersect different cultures; some, such as Alison Renteln, have argued that “empirical research” should be undertaken to “validate universal moral standards” as a basis for human rights.³⁹ This is not the project of epistemic universalists, who attempt to identify what Charles Beitz terms the “nonparochial core” of human rights, and identify the core conditions by which human rights can be established as truly universal – applying to all persons equally.⁴⁰ Alan Gerwith’s analysis of the epistemology of human rights reveals that the quest for a universal moral rule that would be acceptable “to all rational persons” is ultimately dialectically contingent.⁴¹ Gerwith criticises John Rawls and HLA Hart’s arguments about the foundations of rights for their reliance upon a hypothetical agent being in a particular situation and drawing a specific set of conclusions about the importance of human rights.⁴² The ‘agents’ in these formulations were implicitly located in the west or, at least it was possible to infer this from the conclusions about universality that these hypothetical agents drew.⁴³ This point is made in Ernesto Laclau’s critique of universality, where he notes that universality was in the body of a “certain particularity – [the] European culture of the nineteenth century.”⁴⁴ For Laclau, the idea of western-centric universality was an “ontological privilege”, which had been doubled into an “epistemological privilege.”⁴⁵ Therefore, the universality of international human rights law was limited to the declarations contained in human rights instruments – such as the preamble to the UDHR, which references the “inherent dignity” of members of the “human family”; or the repetition of this formulation in the ICCPR, where it is coupled with a legal obligation upon states to

³⁷Peter Fitzpatrick, *Modernism and the Grounds of Law* (CUP 2001) 211

³⁸ Judith Butler, Ernesto Laclau and Slavoj Žižek, *Contingency, Hegemony, Universality Contemporary Dialogues on the Left* (Verso Books, 2000) 37.

³⁹ Alison Renteln, ‘Relativism and the search for Human Rights’ (1998) 90 *American Anthropologist* 56.

⁴⁰ Charles Beitz, ‘Human Rights as a Common Concern’ (2001) 95 *American Political Science Review* 269.

⁴¹ Alan Gerwith, ‘The Epistemology of Human Rights’ (1984) 1 *Social Philosophy and Policy* 1, 21.

⁴² *Ibid.*

⁴³ See John Rawls, *A Theory of Justice* (OUP 1972) 18-21.

⁴⁴ Ernesto Laclau, *Emancipation(s)* (2nd ed. Verso Books, 2007) 24.

⁴⁵ *ibid* 25.

“promote respect” for human rights.⁴⁶ These are not statements acknowledging shared universal practices, or statements acknowledging common epistemic foundations to human rights, but are rather juridical assertions that the content of an instrument codifying international human rights law is truly universal. An international human rights instrument makes the protection of rights a duty of a state party to that instrument in a legal sense; it does not necessarily reflect their political priorities or conceptions of justice.

This illustrates how the codification of rights into international human rights law does not resolve the politics of rights or their foundations. When drafting an instrument, states representing different cultural traditions are able to assert alternate rights or framings of rights, but the resulting instrument will not be a true reflection of what is universal in all societies. This is what triggers ideological opposition, as when a human rights organisation attempts to enforce rights within a state they can be applying rights asserted as universal but not seen as universal by that state. When international human rights law is seen as the ideological product of the existing hegemony within international relations, in which Chantal Mouffe argues the “meaning of social institutions are fixed” and the existing order is contingent “on the exclusion of other possibilities”, ideological opposition becomes anti-imperialist as that hegemony is controlled and defined by the western, formerly colonialist powers.⁴⁷

It is, however, necessary to examine what is meant by ideology, as there are two quite different versions of ideological opposition. The first form of ideological opposition is directed against the ideological content of existing international human rights law. Descriptively ideologies – to use Louis Althusser’s terminology – are mechanisms for representing “the imaginary relationship of individuals to their real conditions of existence.”⁴⁸ When thinking of ideology in relation to international human rights law, it is important to understand it terms of what Martin Seliger labels the inclusive conception of ideology. This does not confine ideology to a specific belief system, such as the manifesto of a political party, but argues that it should be seen as a “group of beliefs and disbeliefs” emerging through a multitude of different practices.⁴⁹ Ideology, Seliger argues, allows groups to justify their “reliance on moral norms” and gives “legitimacy” to the “implements” that

⁴⁶ 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Preamble.

⁴⁷ Chantal Mouffe, ‘Democracy, human rights and cosmopolitanism: an antagonistic approach’ in Douzinas and Gearty (n .21) 181.

⁴⁸ Louis Althusser, *On Ideology* (Verso 2008).

⁴⁹ Martin Seliger, *Ideology and Politics* (George Allen & Unwin 1976) 119.

are required for the “preservation ...or reconstruction of a given order.”⁵⁰ Crucially, as Laclau argues, what turns what would otherwise be a series of practices into an ideology is that an ideology has both a sense of closure, fixing a set of meanings to concepts, and the possibility of “constituting the community” which possess that ideology “as a coherent whole.”⁵¹ As argued in the first part of section two below, the dominant ideology of international human rights law is Western liberalism, because of the history of international human rights law.⁵² It originated as a distinct discipline in the 1940s, with the creation of the UDHR, and was a means of using the enlightenment tradition of the rights of man, developed in Western Europe in the eighteenth century, to respond to the humanitarian crisis triggered by World War Two.⁵³ This means that ideological opposition can involve the proposal of a counter ideology, which proposes a group of beliefs to reconstruct the moral order of human rights. This is ideological opposition as reprioritisation, which seeks to create alternate conceptions of human rights, and was the intention of the Third World bloc’s advocacy of a right to development, detailed in the final section of this chapter. This is ideological opposition against the ideology of international human rights law, as it currently exists, leaving open the possibility for its reform.

The second form of ideological opposition sees international human rights law as the tool of the existing international political order, and is focused less on the content of rights and more on enforcement of universal rights in service of an ideology. The study of ideology, John Thompson notes, is often linked to the construction of social imagery and is “fundamentally concerned with language”, which he argues is a means of preserving structures of domination.⁵⁴ Althusser is more direct in his analysis of the relationship between ideology and the “reproduction ...of capitalist relations of exploitation.”⁵⁵ Althusser principally focuses on explaining the use of ideology, arguing that it “recruits” and “creates” subjects, by creating an explanation of reality and a series of rituals affirming that reality.⁵⁶ Paul Hirst criticises Althusser for simplifying the complexity of ideology’s relations to capitalism, but does not dispute the importance of power in ideology.⁵⁷ Shirley Scott applies this theory of ideology to what she terms “the idea of international law”, arguing that if “the

⁵⁰ *ibid.* 120.

⁵¹ Ernesto Laclau, ‘The Death and Resurrection of the Theory of Ideology’ (1997) 3 *Journal of Political Ideologies* 201, 205.

⁵² See Antonio Cassese, *International Law* (2nd ed. OUP 2005) 381.

⁵³ This narrative of the UDHR’s creation can be found in Johan Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press 2009) 18-21.

⁵⁴ John Thompson, *Studies in the Theory of Ideology* (Polity 1985) 131.

⁵⁵ Althusser (n. 48) 28.

⁵⁶ *ibid.* 46-8.

⁵⁷ Paul Hirst, ‘Althusser and the theory of ideology’ (1976) 5 *Economy and Society* 385.

whole international political order is regarded as a power structure”, international law is the ideology of that power structure.⁵⁸ Scott goes on to note that the ideology of international law “presents legal norms, principles, rules and negotiating positions as” distinct from other norms of international politics, elevating them as “‘more than’ or superior” to other political norms.⁵⁹ It is important to note, however, that this does not mean that international law works only in the interests of neo-imperial formations. Scott argues elsewhere that international law has the power it does in the “international political order because it is a source of power to which all states have some degree of access” noting that when the US invaded Iraq without express UN authorisation, it was accused of “damaging the system of international law.”⁶⁰ Yet, because of the residual imperialism of international law, discussed in more detail below, formerly colonialist states are in more powerful positions in international organisations, so have a greater capacity to use international human rights law in service of their own ideologies. However, this does not stop other states using the available tools of international law to gain power and then use international human rights law as a mechanism to justify their power. This is what the Third World bloc was often attempting to do in the 1970s when organising tactical bloc votes in the UN General Assembly.⁶¹ This form of ideological opposition is anti-hegemonic, and arises if the state or states in question are not in a position of power in the organisation.

So to briefly define ideological opposition; it firstly involves an act or series of acts of opposition, such as a refusal to follow a legal obligation, or a political attack upon an organisation. Secondly, it involves justifying that act of opposition on the basis that either the content of human rights law reflects a particular ideology, or because it is being used to advance a particular ideology.

(2) Anti-imperialism and the ideology of international human rights law

Given the nature of ideological opposition outlined in the preceding section, this section outlines how international human rights law’s content represents ideologically colonial-imperialist priorities, or alternatively could be used as a justification for acts of neo-imperialism. It is worth briefly reviewing the different meanings of imperialism already

⁵⁸ Shirley Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics (1994) 4 EJIL 313, 319-21.

⁵⁹ *ibid* 320.

⁶⁰ Shirley Scott, ‘Identifying the Source and Nature of a State’s Political Obligation Towards International Law’ (2005) 1 JILIR 49, 59.

⁶¹ This explanation of Third World bloc voting patterns is explored in Stephen David, ‘Explaining Third World Alignment’ (1991) 43 World Politics 233.

outlined in this studies' introductory chapter. Colonial-imperialism was imperialism with overseas colonies – territories that did not have an independent legal identity in international law. This form of imperialism involved physical domination of the territorial periphery from the imperial centre, and was prohibited by the 1960 UN Resolution on People Living under colonial rule.⁶² Colonialism, as Edward Said argued in *Culture and Imperialism*, was not just a “simple act of [territorial] accumulation” but was an “impressive ideological formation” which justified ongoing imperial domination.⁶³ Residual imperialism refers to states from the developed world utilising some of the juridical advantages gained from colonialism and the colonial formation of international law to gain a comparative advantage over states in the developing world. An obvious example is the presence of Britain and France on the UN Security Council, as their presence was a reflection of their power in 1945, a position that was a reflection of their colonial empires. It is possible, as hegemonic theorists of imperialism sometimes do, to mistake the existence of residual imperialism as evidence of an imperial formation, but residual imperialism in international law is a residue of past imperial power, not necessarily evidence of its continuation.⁶⁴ Neo-imperialism is different, as it describes the projection of imperial power, without the presence of an actual physical empire. The role of the US in UN-backed post-Cold War military operations enforcing international legal norms – such as the operations against Iraq in 1990 and Somalia in 1992 – were a form of power projection, and the vast asymmetry of US military and economic power in these instances led to numerous associations with colonial-imperialism. However, as Martin Shaw argues, the “contradictions of quasi-imperial rule” were so numerous that it was difficult to conclude “power networks in the post-Cold War era” constituted “an amorphous Empire.”⁶⁵

Residual imperialism requires the power of international law, and is only manifested through the structures of international law; neo-imperialism does not necessarily require international law or organisations, but uses international law, or its principles, as a justification for actions involving the domination of weaker territories. Colonial, residual and neo-imperialism all had an influence in the formation and application of international human rights law, and the ideological strands of opposition detailed in the third section of this

⁶² A/Res 1514(XV) 14 Dec 1960.

⁶³ Edward Said, *Culture and Imperialism* (Vintage Books 1994) 9.

⁶⁴ For an outline of hegemonic theories see Harry Targ, ‘Global Dominance and Dependence, Post-Industrialism, and International Relations Theory: A Review’ (1976) 20 *International Studies Quarterly* 461. On the issue of revolutionary movements see AA Fatouros and others, ‘Radical Perceptions of International Law and Practice’ (1972) 66 *AJIL* 162.

⁶⁵ Martin Shaw, ‘Post-Imperial and Quasi-Imperial State and Empire in the Global Era’ (2002) 31 *Millennium Journal of International Studies* 327, 335.

chapter originated as response to this. The first part of this section examines the ideology of international human rights law and its imperialist ontology, looking at the content of international human rights law. The second part of this section examines how international human rights law could be used as a justification for neo-imperialism, examining it as an instrument used to ideologically justify acts of neo-imperialism.

(i) *The ideology of international human rights law: residual and colonial imperialism in the content of international human rights law*

Universal human rights in their juridical form originated in what Carl Schmitt termed the *nomos* of colonialism, which “considered Christian nations to be the creators and representatives of an order applicable to the whole earth.”⁶⁶ José-Manuel Barreto notes that the sixteenth century legal theorist Francesco Vitoria used an early version of universality in his writings on Central American Indians, which held that whilst they were “barbarians and as a consequence slaves”, they should not be excluded from the human race, but protected so that they could be converted to Christianity.⁶⁷ As Michael Hardt and Antonio Negri note, Bartholomew Las Casas, a Dominican monk writing in the sixteenth century, created the concept of universal jurisdiction in part because he believed that the native population could be converted to Christianity and therefore saved.⁶⁸ This began the association between the civilising mission of colonial-imperialism and juridical universality. This permeated into eighteenth century thinking, as John Hobson noted, Immanuel Kant’s concept of perpetual peace was predicated on the removal of the “threat to civilized states” from “uncivilized societies.”⁶⁹ Whilst, as Howard Williams notes, Kant was often hostile to the practices of colonialism at the time he was writing, the concept of Kantian perpetual peace had significant implications for the eventual intellectual project of international human rights law.⁷⁰

The concept of a universal civilising mission found its way into international human rights law; Article 28 of the UDHR described the creation of a “social and international order” that

⁶⁶ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (GL Ulmen trans. Telos Press 2006) 86.

⁶⁷ José-Manuel Barreto, ‘Imperialism and Decolonization as Scenarios of Human Rights History’ in Barreto eds. *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing 2013) 142-3

⁶⁸ Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000) 115.

⁶⁹ John Hobson, *The Eurocentric Conception of World Politics: Western International Theory, 1760-2010* (CUP 2012) 72-75.

⁷⁰ Howard Williams, ‘Colonialism in Kant’s Political Philosophy’ (2014) 39 *Diametros* 154. On this point see also Andreas Follesdal and Reidar Maliks, ‘Kantian Theory and Human Rights’ in Follesdal and Maliks (eds.), *Kantian Theory and Human Rights* (Routledge 2014).

could realise human rights.⁷¹ This seemed to imply that human rights are a new form of civilisation, and inspired the American Anthropological Association's 1947 declaration of opposition to the UDHR, which described the west as "aberrational in its response to cultural difference" during colonial-imperialism, and reasoned that international human rights law would similarly disregard cultural differences.⁷² This particular criticism of universality has come under some attack, not least because it seemed to suggest that, as the idea of universality was colonial-imperialist, any appeal to universal values as a defence against oppression was redundant.⁷³ However, the interconnection between universality and a standard of civilisation has permeated into the framework of human rights law: the preambles to the ICCPR and the ICESCR implicitly reference the civilising mission when they refer to creating the "conditions" to enjoy human rights.⁷⁴ It also permeates into the application of human rights in other international instruments, seemingly creating classes of civilised and uncivilised in international society. Mukua Mutua argues that international human rights law required the construction of savages, victims and saviours, noting that the need to search for an uncivilised other had made it difficult for it to gain "cross cultural-legitimacy."⁷⁵ The universalising process was designed, in the words of Homni Baba, to give a "hegemonic 'normality'" to the uneven development of the world.⁷⁶

The ideology of international human rights law could therefore be said to be colonial-imperialist, in part because it reflected a core component of the colonial-imperial civilising mission. The priorities and the substantive interests protected in international human rights law also reflected a set of ideological priorities that were particular to a liberal, European conception of human rights, and this can be seen in two distinct areas. Firstly, the UDHR was shaped in a way that strengthened the nation state, or more accurately the Western nation state. During the UDHR's drafting process; the USSR, along with Britain, France and the US often worked together to limit the scope of the Declaration. The British delegate managed to successfully oppose a proposal from Latin American states recognising the legitimacy of revolution against tyranny, because of fears that colonial independence movements would

⁷¹ Universal Declaration of Human Rights 1948 GA Res 217A(III).

⁷² Karen Engle, 'From Scepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999' (2001) 23 HRQ 536, 538.

⁷³ See Terrance Turner, 'Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics' (1997) 53 Journal of Anthropological Research 273; Christos Galanos, 'Universal human rights in the face of cultural relativism and moral objectivity: preaching or teaching' (2010) 16 UCL Jurisprudence Review 29.

⁷⁴ See preamble of the ICCPR and ICESCR (n 46 & 4 respectively).

⁷⁵ Makau Mutua, 'Savages, victims, and saviours: the metaphor of human rights' (2001) 42 Harvard International Law Journal 201, 206.

⁷⁶ Homni Bhaba, *The Location of Culture* (Routledge 2006) 245-7.

use it as a justification to rebel against colonial imperialism.⁷⁷ Minority rights were not included in the UDHR because of state concerns about their divisive political effect, which, as Johanna Gibson argues, was to have a detrimental effect on the protection of indigenous communities.⁷⁸ Article 2 was also opaque in terms of its condemnation of racism, calling for equal enjoyment of rights irrespective of race, but making no outright call for states to actively prohibit racism or abolish 'separate-but-equal' systems of racial segregation, such as apartheid.

Secondly, international human rights law specifically prioritised protecting civil and political rights, such as the protection of free speech and the right to elections, over economic and social rights. The standard differences between civil and political rights and economic and social rights are – as Phillip Alston and Gerald Quinn note – that the former are considered “non-political”, whereas the latter “are often perceived to be of deeply ideological nature” and “necessitate an unacceptable degree of intervention in the domestic affairs of states”.⁷⁹ This was reflected in the ideological position taken by the US, UK and other Western states on the role of international law. As Alston noted in his commentary on the ICESCR, it was dubbed in some US political circles the “Covenant on Uneconomic, Socialist and Collective Rights”.⁸⁰ In the early 1950s, the US had managed, by process of political manoeuvres in the drafting committee of the Human Rights Commission, to get socio-economic rights codified in a separate instrument to civil and political rights.⁸¹ During the drafting process, it was not clear that this was an issue that particularly unified postcolonial states – India joined forces with the UK in opposing the codification of relatively “open-ended” rights in international law.⁸² Other postcolonial states involved in the drafting process framed the issue in terms of self-determination, claiming that human rights instruments would be meaningless unless they contained economic, social and cultural rights.⁸³ As Daniel Whelan notes, this allowed some postcolonial states to reject international human rights law in its entirety because of the lack of protection for economic and social rights. Jack Donnelly argues that the language of progressive realisation in the ICESCR does not necessarily limit or render the rights contained in it as lesser than the ICCPR, and argued that criticism stemming from the non-

⁷⁷ *ibid* 186.

⁷⁸ Johanna Gibson, 'The UDHR and the Group: Individual and Community Rights to Culture' (2008) 30 *Hamline Journal of Public Law and Policy* 1.

⁷⁹ Phillip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *HRQ* 156, 160.

⁸⁰ Phillip Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 *AJIL* 365, 366.

⁸¹ Daniel Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press, 2010) 84.

⁸² *ibid* 118.

⁸³ *ibid* 123.

justiciability of the ICESCR was exaggerated.⁸⁴ However, this was an unequal formulation, intentionally engineered by certain states involved in the drafting process. Even though it was not economic and social rights of the sort protected in the ICESCR that were often pursued by the Third World bloc, which was more preoccupied with developmentalism and economic self-determination, it nevertheless reflected the idea that human rights reflected a Western conception of the economy and society.⁸⁵

The above illustrates how the content of international human rights law can be seen as having an ideological nature that reflects a particular set of interests rooted in a particular tradition of rights. Its content utilises concepts that are predicated on a colonial-imperial assumption of universal dominance. This is not to say that the content of human rights is completely a reflection of colonial-imperialism, but it illustrates how this critique can emerge as a result of international human rights law's residual imperialism. As noted in the introduction, decolonisation of human rights law would provide a conception of human rights that could be removed from the context of colonial imperialism described above. José-Manuel Barreto argues that a decolonial conception of human rights would defy the "dynamics and prevailing prejudices" of existing human rights law, and would break the silence to which the Third World has been "condemned" to in the construction of human rights law.⁸⁶ What Barreto's critique focuses on specifically is the assumption that the European or Eurocentric history of human rights is the only history of human rights. The need to reinvent the history of human rights would contribute to what Barreto called the "globalization of human rights" – which would involve drawing on different cultures and traditions from across the world as the basis of a new form of human rights law.⁸⁷ A decolonised form of human rights would address the residual and colonial imperialism of international human rights law. Some instances of anti-imperialist ideological opposition detailed in the third section of this chapter ostensibly sought to achieve a decolonised conception of human rights law. However, as will be shown, the three main strands of anti-imperialist ideological opposition often became justificatory mechanisms for states from the Third World bloc to protect their sovereignty.

⁸⁴ Jack Donnelly, 'The West and Economic Rights' in D Barak-Erez and A M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007).

⁸⁵ See Richard Falk, 'Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries' (1979) 1 *Universal Human Rights* 3.

⁸⁶ José-Manuel Barreto, 'Decolonial Strategies and Dialogue in the Human Rights Field' from Barreto (n 67) 6.

⁸⁷ *ibid* 18.

(ii) *International human rights law as an ideological instrument; the use of international human rights as a justification for neo-imperialism*

What distinguishes neo-imperialism from colonial-imperialism is that where territorial domination occurs in neo-imperialism, it is temporary, so it does not technically fall under the terms of the Resolution 1514 on the Independence of Peoples Living under colonial rule. After the Cold War, the 'New World Order' effectively treated economic liberalism as the default position for states, which, as Manfred Bienefeld argues, was a form of imperialism, as it envisaged a monolithic world defined almost exclusively by the US.⁸⁸ However, these theories have struggled to adapt with shifts in power, in particular the enormous rise of Asian economic power and quasi-imperialist policies from China.⁸⁹ Some theorists on globalisation in the early 2000s argued that, in tandem with the European Union, the US formed a Western state conglomerate.⁹⁰ Whilst this theory is not without its problems, the states in this conglomerate enjoyed the benefits of residual imperialism and seemed to be the states benefiting from specific neo-imperialist policies. These states were also all in the Western Europe and Others voting bloc at the UN, which gave a geographic and ideological basis to the idea of neo-imperialism; if this bloc was the centre, then the African and Asian blocs constituted the periphery. Western neo-imperialism, as opposed to Soviet and more recently Chinese neo-imperialism, has often used human rights as a justification. It is often the rhetoric of rights that is used, rather than any specific provision of international human rights law, but this was sufficient to create an association between neo-imperialism and human rights law for the purposes of ideological opposition. This is different from what was discussed in the first part of this section, as this was how human rights was used, not about the content of human rights law.

The first example of human rights being used as a justification to advance neo-imperialism was the use of property rights to foil attempts by the Third World bloc to reprioritise international law to advance redistributive interests. The campaign for the New International Economic Order (NIEO) in the 1970s – a movement launched by the Third World bloc at the

⁸⁸ Manfred Bienefeld, 'The New World Order: echoes of a new imperialism' (1994) 12 TWQ 31. See also Timothy Shaw, 'The South in the 'New World (Dis)Order': towards a political economy of Third World foreign policy in the 1990s' (1994) 15 TWQ 17.

⁸⁹ See Ray Kiely, *Rethinking Imperialism* (Palgrave Macmillan, 2010) ch 8; Fran Shor, 'Declining U.S. Hegemony + Rising Chinese Power: A Formula for Conflict?' (2011) *State of Nature* <<http://www.stateofnature.org/decliningUsHegemony.html>> accessed 5 December 2011.

⁹⁰ For examples see Clyde Barrow, 'The return of the state: Globalization, State Theory & the New Imperialism' (2005) 27 *New Political Science* 123; Leo Pantic, 'The New Imperial State' *New Left Review* March – April (2000); Martin Shaw 'The State of Globalization: Towards a Theory of State Transformation' (1997) 4 *Review of Political Economy* 497.

UN General Assembly – aimed to realign aspects of international law to improve the material conditions of postcolonial states. Aspects of the NIEO movement had been around for some time. In 1951, the Chilean delegate to the UN Human Rights Commission raised the issue of sovereignty over natural resources during the discussion on the right to self-determination. After decolonisation, control of natural resources often remained in the hands of Western owned private companies. As Sundhya Pahuja argues, this was essentially a continuation of the colonial project, which in the eighteenth and early nineteenth centuries had used the control of economic resources as a justification for the occupation of territory.⁹¹ By the 1970s, Prashad argues, the NIEO was needed, as economic development within the Third World bloc had reached an impasse and little more could be done “without major international transformation.”⁹² A realignment of international law, Prashad went on to argue, was justified, as Western powers had been able to exploit their residual imperialism to control the shape of the international economy. For example, the General Agreement on Trade Tariffs, by effectively legitimising a range of market distorting practices that directly and indirectly benefited Europe and America, became a vehicle for the continuation of colonial era imbalances in world trade.⁹³

A 1973 conference in Algiers of Non-Aligned Movement states supported permanent sovereignty over natural resources and the reorganisation of world trade rules, but it was at the Sixth Special Session of the UN General Assembly in April 1974 that the phrase ‘New International Economic Order’ was first used. This Session issued two key resolutions; the Declaration on the Establishment of a New International Economic Order, and the Programme of Action on the Establishment of a New International Economic Order. The Declaration framed liberation from colonialism both in terms of political independence, by affirming the right of peoples under “colonial and racial domination and foreign occupation to achieve their liberation” and in terms of economic liberation, emphasising the importance of control of natural resources and “international economic co-operation” as a form of liberation.⁹⁴ Both the Declaration and the Charter contained numerous references to the nationalisation of industries extracting natural resources. The US Ambassador to the UN lambasted the Declaration for its numerous “objectionable features” and lodged several

⁹¹ Sundhya Pahuja, *Decolonising International Law; Development, Economic Growth and the Politics of Universality* (CUP 2011) 44-49. From the mid-19th century liberal ideas of imperialism became dominant in colonial-imperialism – see Kiley (n 89) 42-53.

⁹² Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (Verso 2013) 49.

⁹³ See Ha-Joon Chang, ‘Kicking Away the Ladder: Development Strategy in Historical Perspective’ (Anthem Press 2002) 79-90.

⁹⁴ GA Res 3201 (S-VI) 1 May 1974, Art 4 (h)-(n).

reservations.⁹⁵ Formerly colonialist states' objections centred around the need for adequate compensation for any nationalisation of resources, which many states in the Third World bloc were unable to give.⁹⁶ By framing it as a right and as part of the injustice of colonial wrongs, it was clear that the Third World bloc intended to circumnavigate this requirement and hence vitiate the property rights of the Corporations that owned or had claims to natural resources in Third World bloc states. Advocates of the NIEO implied as much – for example, when Milan Bulajic argued that the economic equality of states demanded that the foundations “of the old international legal system [the] ‘law of civilized nations’” needed “a new approach” that would correct these norms “to include preferential treatment” for postcolonial states.⁹⁷

The Charter of Economic Rights and Duties of States, which was drafted under the terms of the Programme of Action, contained far-reaching provisions allowing states to “nationalize, expropriate or transfer ownership of foreign property” and enact controls on Transnational Corporations.⁹⁸ At the time this was heavily criticised by American scholars, who argued that this was incompatible with the rule of law and strayed outside the legal scope of international organisations.⁹⁹ Behind these all of criticisms, there was a distinct concern about the protection of property rights of corporations against the state. As Pahuja notes, from the late 1970s onwards – driven in part by these concerns – Western states used a variety of legal blocking moves to avoid the NIEO having any substantive effect.¹⁰⁰ This was read as a manifestation of imperialism by Third World legal critics, such as Gutto, who argued that “all of [the] countries with substantial enriched imperialistic relations to the rest of the world” had opposed the reform of international law.¹⁰¹ There were conceptual and legal problems with the NIEO, but what was significant was the way in which Western states used their residual imperialist advantage, justifying their actions by reference to the protection of property rights. Karin Mickelson noted that cases such as these showed how

⁹⁵ United Nations General Assembly Sixth Special Session – Reservations Entered by the United States (1974) 13 ILM

⁹⁶ Robin White, ‘A New International Economic Order’ (1975) 24 ICLQ 542, 547.

⁹⁷ Milan Bulajic, “General Principles and the Charter of Economic Rights and Duties of States” in Kamal Hossain (ed) *Legal Aspects of the New International Economic Order* (Francis Pinter Ltd 1980) 45 and 61.

⁹⁸ GA Res 3281 (XXIX) 12 Dec 1974.

⁹⁹ See Burns Weston, ‘The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth’ 75 AJIL 437; John Conybeare, ‘International Organization and the Theory of Property Rights’ (1980) 34 International Organisation 207.

¹⁰⁰ Pahuja (n 91) 126-137.

¹⁰¹ SBO Gutto, “Violation of Human Rights in the Third World, Responsibility of States and TNC’s’ (1983) 23 Indian International Law Journal 56, 58.

international law, and by implication international human rights law, could be appropriated as a “hegemonic instrument of the North.”¹⁰²

The second, and most visible, example of neo-imperialism in the post-Cold War era was the use of war as a form of rights protection: in the 1999 Kosovo war, the 2001 Afghan war and the 2003 Iraq war. Formerly colonialist states were able to use their residual imperialist powers on the UN Security Council and membership of NATO to declare legal actions that involved a violation of state sovereignty by force, and would otherwise be illegal under the UN Charter.¹⁰³ Humanitarian intervention, Ikechi Mgbeoji argues in somewhat stark terms, involves the “vilification of those of us believed to be uncivilized”, a process that is both “historically evidenced in European Colonialism” and dependent on modern day “imperial delusions.”¹⁰⁴ Other authors have more broadly argued that the use of human rights as a basis for international action represents the development of liberal imperialism, with human rights as a driving imperative.¹⁰⁵ Between 1994 and 1995, in policy circles there was at least a partial revaluation of the constraints of sovereignty; as the twin tragedies of the massacres in Srebrenica and the six-week genocide in Rwanda provided a strong moral imperative for a reconsideration of the principle of non-intervention in the domestic affairs of states.¹⁰⁶ In 1999, when the US and Britain sidestepped international law to intervene in Kosovo, the doctrine of humanitarian intervention was created.¹⁰⁷ Tony Blair, the then British Prime Minister, gave a speech in Chicago in 1999 in the midst of the air war in Kosovo, arguing that “the principle of non-interference must be qualified” when genocide or internal oppression was taking place.¹⁰⁸ Blair’s speech advocated the rejection of international legal constraints in favour of the transcendent properties of human rights. Shortly after the Kosovo intervention, the Bush administration resisted any attempt at US cooperation with the ICC, and sought to reverse the trend towards a conception sovereignty bounded by the protection of human rights where it did not accord with their interests.¹⁰⁹ This seeming

¹⁰² Karin Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ (1997) 16 *Wisconsin International Law Journal* 353, 414.

¹⁰³ See Gerry Simpson, ‘Still Illegal: The War in Iraq and International Law’ (2004) 6 *MJIL*

¹⁰⁴ Ikechi Mgbeoji, ‘The Civilised Self and the Barbaric Other: imperial delusions of order and the challenges of human security’ from Richard Falk and others (eds), *International Law and the Third World Reshaping Justice* (Routledge 2008) 152.

¹⁰⁵ David Rieff, ‘A New Age of Liberal Imperialism?’ (1999) 16 *World Policy Journal* 1.

¹⁰⁶ Michael Mandelbaum, ‘The Reluctance to Intervene’ (1994) 95 *Foreign Policy* 3.

¹⁰⁷ The legality of the of the Kosovo intervention is discussed in Louis Henkin, ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 *AJIL* 824.

¹⁰⁸ Transcript of Tony Blair’s Speech to Chicago Economic Club 22 April 1999

<http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html> accessed 26 June 2015.

¹⁰⁹ Anne Clunan, ‘Redefining Sovereignty: Humanitarianism’s Challenge to Sovereign Immunity’ in Noha Shawki and Michaelene Cox, *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate Publishing, 2009) 20.

double standard seemed to suggest that human rights became transcendent over international norms, such as state sovereignty, when it accorded with the interests of formerly colonialist states.

There was considerable criticism of the Kosovo intervention because of its imperialist implications, as Jonathon Charney argued it left “the door open for hegemonic states to use [it] for purposes clearly incompatible with international law.”¹¹⁰ Yet there is a problem with Charney’s line of argument on act-utilitarian grounds as in some cases upholding international law and protecting sovereignty could involve many more deaths, and it is difficult to see why the norms of international law should logically assume priority. Ann Orford has perhaps a more nuanced critique when she notes that the problem with humanitarian intervention, especially in the context of the 2003 invasion of Iraq, was that it could be read as “part of the history of global imperialism.”¹¹¹ Orford argues that the territorial aspect of humanitarian intervention and the construction of a simplistic and primitive narrative of peoples in states where interventions were taking place were reminiscent of colonial imperialism.¹¹² As Mohammed Ayoob argued, humanitarian intervention was a “non starter”, because it was either “blatantly politically motivated” or was destined to a structural failure, as it could not solve the root causes of conflict and often the intervening armies lacked sufficient expertise to rectify underlying political problems in the state.¹¹³ Ayoob goes on to argue that humanitarian intervention ignores the contributory role of Western actions, through the process of decolonisation and exclusionary economic policies, in creating long-term instability within postcolonial states that were the subjects of interventions.¹¹⁴ Yet humanitarian intervention deserves some defence as a practice, not least because in some cases, such as the 2000 intervention in Sierra Leone – which was popular in the country itself – it was been successful. As Michael Waltzer notes, there is a tendency among some on the left to view all humanitarian intervention as imperialist, but it is possible, as Terry Nardin argues, to differentiate between humanitarian and non-humanitarian, or imperialist, interventions.¹¹⁵ It is also noteworthy that the Constitutive Act

¹¹⁰ Jonathon Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’ (1999) 32 *Vanderbilt Journal of Transnational Law* 1231.

¹¹¹ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003) p.47.

¹¹² *ibid* 48-9.

¹¹³ Mohammed Ayoob, ‘The New-Old Disorder in the Third World’ (1995) 1 *Global Governance* 59, 70-1.

¹¹⁴ *ibid*.

¹¹⁵ Michael Waltzer, ‘On Humanitarianism’ (2011) 90 *Foreign Affairs* 69;. Terry Nardin, ‘Response to “Ending Tyranny In Iraq” Humanitarian Imperialism’ (2005) 19 *Ethics International Affairs* 21.

of the African Union enshrines a right to intervene in states in “grave circumstances namely...crimes against humanity.”¹¹⁶

Yet, as Costas Douzinas notes, rights undergo a significant shift when “they are turned from a discourse of rebellion and dissent” into a mechanism for justifying state action.¹¹⁷ Humanitarian intervention appropriated human rights as the justifying logic for the military conquest of weaker states by stronger states. Whatever the morality of individual cases, the effect that individual interventions had on the discourse of human rights was to associate the protection of human rights with military force that had a problematic legal basis. The use of human rights as a justification for neo-imperialism has, Balakrishnan Rajagopal argues, made it part of the “institutionalised hegemony” of international law and has become an instrument for the maintenance of the hegemonic power of Western states.¹¹⁸ This is problematic because, as shown below, some governments after 2003 used this argument as a justification for the wholesale rejection of international human rights law. As Oscar Schachter argued, it would be better to “acquiesce in a violation that is considered necessary and desirable in the particular circumstances” than it would be “to adopt a principle that would open a wide gap in the barrier against unilateral use of force.”¹¹⁹

(3) Anti-imperialist ideological opposition to human rights organisations

Ideological opposition, as the first section of this chapter argued, either argues for reprioritisation of international human rights law, based on arguments that it should protect a different series of priorities; or advances arguments in outright opposition to human rights on the basis that they are part of a hegemonic neo-imperial international order. In the preceding section, it was argued that international human rights law contained imperialist elements, due to its formation through colonial-imperial international law, and that international human rights law was also used to justify acts of neo-imperialism. Resistance to the imperialist ideological content or application of international human rights law formed the basis of ideological opposition from the Third World bloc towards international human rights organisations, and this section looks at three case studies of anti-imperialist ideological opposition.

¹¹⁶ Constitutive Act of the African Union 2000 OAU Doc CAB/LEG/23.15, Art 4(h).

¹¹⁷ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart-Publishing, 2000) 15

¹¹⁸ Balakrishnan Rajagopal, ‘Counter-hegemonic International law: rethinking Human Rights and Development as a Third World Counter Strategy’ (2006) 27 TWQ 767, 770-772 criticises international human rights law and human rights advocates for not investigating the causes of the Iraq war when it was a war being fought in the name of human rights.

¹¹⁹ Oscar Schachter *International Law in Theory and practice* (Martinus Nijhoff 1991) 126..

The first case study looks at anti-hegemonic opposition to the International Criminal Court (ICC), which asserted that the court supported a neo-imperialist hegemony. Anti-hegemonic opposition did not attempt to decolonise international human rights law, but rather maintained that human rights was an instrument of imperialist power and should be opposed outright. The second case study looks at the creation of a right to development, which was a form of reprioritisation of international human rights law. The third case study examines how states utilise cultural relativism as a form of ideological opposition, in a process called defensive relativism, by looking at how the Asian values debate of the mid-1990s influenced pre-emptive ideological opposition to a regional human rights organisation. Significantly, even attempts to reform international human rights law, as detailed in the second and third case studies, resulted in the case for reform morphing into arguments in favour of enhancing state power against international organisations. In practice, neither of these types of anti-imperialist ideological opposition came close to providing what Barreto terms decolonised human rights law.¹²⁰ Collectively, these case studies show how anti-imperialism developed specific strands of ideological opposition to international human rights law, and how in turn this specifically influenced opposition to human rights organisations.

(i) *Anti-hegemonic opposition; Anti-imperialism and the International Criminal Court (ICC)*

Anti-hegemony implies the existence of a hegemonic imperial formation. Antonio Gramsci's theory of hegemony provided an explanation of why empires, and their inherent capitalist inequalities, persisted. Gramscian methodology was used to construct an explanation of the universalisation of class and the transnationalisation of the capitalist hegemony that was "forced or imposed on subaltern classes", who in turn "either resisted" or "capitulated."¹²¹ Whilst not explicitly referenced by proponents of anti-hegemony, the assumption that Western economic power created a globalised class system that allowed the projection of Western values was common in the rejection of international human rights law. International law's residual imperialism, which was present in the structure of international organisations, gave juridical advantages to former colonialist states. Anti-hegemonic opposition was anti-imperial in its outlook, in that it sought to resist manifestations of neo- and residual- imperialism of the sort outlined in the second section of this chapter, but

¹²⁰ Barreto (n 86).

¹²¹ Randall Germain and Michael Kenny, 'Engaging Gramsci: International Relations Theory and the New Gramscians' (1998) 24 *Review of International Studies* 3, 18.

crucially, it did not contain any detailed programme for the reform of international human rights law beyond the act of resistance.

Anti-hegemonic ideological opposition maintained that, formerly colonialist states justified neo-imperialist actions using either the substance or language of human rights. During the 1980s, the US justified supporting right wing authoritarian regimes in Latin America because they protected property rights and were deemed more likely than communist regimes to evolve into democracies.¹²² In the 1990s, the US had a policy of condemning regimes they perceived as human rights violators, which also had a tactical dimension. The condemnation of Cuba and action against the government of Panama, where justified on loose human rights grounds but were also pursued in the tactical interests of US foreign policy.¹²³ Tactical double standards on the application of human rights, David Held argues, led to Western powers “being seen as self-interested, partial and insensitive”, and made human rights appear to be “just a product of short-term geopolitical or geoeconomic interests.”¹²⁴ From 2002 onwards, the vivid association by President George Bush Jr. of the forceful spread of democracy and the protection of human rights toxified the concept of human rights; a sentiment which was to only grow after the 2003 Iraq war. At a 2004 UN Security Council debate on the ongoing Genocide in the Darfur region of Sudan, the Pakistani ambassador questioned whether human rights concerns “might not be a Trojan horse.”¹²⁵ A similar criticism of US human rights concerns in Darfur came from members of the Arab League, who argued that responsibility for the security situation lay with solely with the US.

This toxification was so totalising that when Non-Governmental Organisations made arguments in favour of the protection of human rights during the 2011 Arab Spring, they were criticised as being arguments for imperialism.¹²⁶ Robert Mugabe’s speech to the UN General Assembly in 2007 is a poignant example of anti-hegemonic ideological opposition.¹²⁷ The colonialist origins of the UDHR were condemned in the speech for being part of the

¹²² See Alan Tonelson, ‘Human Rights: The Bias We Need’ (1983) 49 *Foreign Policy* 52, 56.

¹²³ John Dietrich, ‘U.S. Human Rights Policy in the Post-Cold War Era’ (2006) 121 *Political Science Quarterly* 269.

¹²⁴ David Held, *Cosmopolitanism: Ideas and Realities* (Polity 2010) 135.

¹²⁵ Alex Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (2005) 19 *Ethics & International Affairs* 31, 42.

¹²⁶ Sohrab Ahmari, ‘Beware those who sneer at ‘human rights imperialism’ *The Guardian* 4 January 2011 <<http://www.guardian.co.uk/commentisfree/libertycentral/2011/jan/04/human-rights-imperialism>> accessed 9 December 2011.

¹²⁷ Statement by His Excellency the President of the Republic of Zimbabwe, Comrade RG Mugabe on the Occasion of the 62nd Session of the United Nations General Assembly 26 September 2007, General Assembly of the United Nations, General Debate (25 September – 3 October 2007) statements and webcast <<http://www.un.org/webcast/ga/62/>> accessed 24 July 2015.

system “which suppressed and oppressed [Zimbabweans].”¹²⁸ The Iraq war and American imperialism were condemned as standing for “civilisation” which “occupied ...colonised ...incarcerated and killed”, and the imperialist nature of the Iraq war was used by Mugabe as a deflection mechanism against any discussion of Zimbabwe’s human rights record.¹²⁹ Zimbabwe had already been criticised by the Committee on the Elimination of Racial Discrimination (CERD’s enforcement body), and as chapter four details, had also come to the attention of regional bodies. Mugabe’s anti-imperialist opposition was not specifically directed against any of these organisations, but against any human rights enforcement. This line of argument was only able to gain traction because the promotion of human rights was widely associated with the US’ neo-imperialist actions, giving credence to the rejection of international human rights law by governments when justified by anti-imperialism. As Ian Phimister and Brian Raftopolous note, arguments about imperialism have a particular impact among governments in Southern Africa that have had a political hinterland resisting apartheid.¹³⁰ This form of opposition is not necessarily linked to a substantive agenda for the reform of international human rights law, although some scholars, such as Balakrishnan Rajagopal, have argued that the intertwining of neo-imperialism and human rights created a demand for a new conception of human rights.¹³¹ However, demands for substantive changes to international human rights law were often absent from anti-hegemonic, anti-imperialist ideological opposition as practiced by the leaders of governments.

Since the late 2000s, attacks on the ICC have been the area where anti-hegemonic ideological opposition has had its most significant impact.¹³² The preamble to the 1998 Rome Statute of the ICC asserts the existence of a common humanity, but at the same time professes to respect national sovereignty in the exercise of its universal jurisdiction for crimes against humanity, war crimes and genocide.¹³³ Although it was modelled on the specialist war crimes tribunals, which had been given international legal authority on an ad hoc basis by the UN Security Council, the ICC was intended to be permanent and independent of the UN. The office of the prosecutor was intended to be an independent office immune from direct influence, but the Security Council retained the power to initiate

¹²⁸ *ibid.* 2

¹²⁹ *ibid.* 3

¹³⁰ Ian Phimister and Brian Raftopolous, ‘Mugabe, Mbeki and the Politics of Anti-Imperialism’ (2004) 101 *Review of African Political Economy* 304.

¹³¹ See Rajagopal (n 118).

¹³² Although some maintain that there is a distinction between International Criminal Law and International Human Rights Law, the ICC clearly deals with cases such as *Prosecutor v. Laurent Gbagbo* ICC-02/11-01/11 where there is a clear overlap between the two types of law.

¹³³ Benjamin Schiff, ‘Universalism meets sovereignty at the international criminal court’ in Shawki and Cox (n 109).

prosecutions and delay prosecutions – a clear element of residual imperialism. In the early 2000s, there was a significant controversy over the failure of the US to sign the Rome Statute – a decision principally driven by the Bush administration’s hostility to the Court.¹³⁴ This was a naked act of double standards by the Bush administration, who not only used claims of American exceptionalism to avoid submitting to the Court’s jurisdiction, but also pressured other states into making bilateral immunity agreements so that American personnel in a signatory state’s jurisdiction could not be brought before the ICC.¹³⁵ Anti-imperialist criticism of the ICC initially focused on these double standards, and the first indictments in cases from the Democratic Republic of Congo (DRC) and Uganda drew little criticism.¹³⁶

Ratification of the Rome Statute was encouraged by a variety of international organisations, and by 2012, 34 African states and 18 states from the Asia Pacific region had ratified the statute. In the latter case, it is, however, noteworthy that many large and economically successful postcolonial states, such as India, Indonesia and Malaysia, are not signatories to the Rome Statute. The particularly controversial element of the Rome Statute was Article 17, which stated that where a state was unwilling or “genuinely unable” to carry out an investigation, the ICC could exercise its jurisdiction.¹³⁷ This provision was meant to preserve the principle of state sovereignty and treat the ICC as a court of last resort, but in practice, the “ability” of a state became synonymous with its economic development. In early 2006, the prosecutor officially closed his preliminary investigation into abuses by coalition forces in Iraq.¹³⁸ This meant that military tribunals and the civil justice system in England and Wales resolved British war crimes in Iraq, whereas Congolese war crimes were referred to the ICC. It is important to put the previous statement into context; only five of the most serious cases from the DRC have been referred to the ICC, and the magnitude of the charges in these cases is significantly greater than alleged offences committed by British soldiers in Iraq. It is also doubtful whether the DRC’s justice system is capable of mounting such prosecutions; a UN report in 2010 concluded that its court system was prone to systemic corruption and procedural biases.¹³⁹ That said, material conditions heavily influence the gap between the

¹³⁴ Alex Clunan, ‘Redefining Sovereignty: Humanitarian’s Challenge to Sovereign Immunity’ in Shawki and Cox (n 109) 7-26.

¹³⁵ *ibid.*

¹³⁶ For an example see Hardt and Negri, *Multitude* (Penguin Books 2006) 28-30.

¹³⁷ Rome Statute of the International Criminal Court 1998 UN Doc.A/CONF.183/9, Art 17(1) a.

¹³⁸ David Bosco, *Rough Justice: The International Criminal Court in a world of power politics* (OUP 2014) 119.

¹³⁹ OHCHR ‘Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003’ August 2010, 411-429 <http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf> accessed 30 April 2012

justice system's capacity in the two countries, and material imbalances between them stem back to the fact that the DRC is a postcolonial state and Britain is a formerly colonialist state. Therefore, even though pragmatically there is a strong case for the ICC focusing on African states, this in part is a consequence of the conditions generated by colonial-imperialism and continued by neo-imperialism. The Indian delegate during the drafting process expressed similar concerns about the provision in the draft statute that allowed the UN Security Council to initiate investigations. They argued that this would result in powerful states placing themselves above the law, and would thus open the door to "neo-colonialism."¹⁴⁰

The criticism directed against the ICC significantly escalated after the Sudanese president Omar Al Bashir was indicted in 2008, first for Crimes Against Humanity and then later in 2009 for Genocide. At the July 2009 AU Assembly of Heads of States and Government, the then Libyan President Muammar al-Gaddafi urged AU states to sign up to the Sitre Declaration, which called for non-cooperation with the ICC.¹⁴¹ Kurt Mills described this as an obviously "defensive move responding to a perception that the West was ganging up on Africa" and noted that some states were willing to take a much more moderate line or pursue alternative regional solutions.¹⁴² However, as will be shown in chapter four, the regional alternatives were subject to a variety of override mechanisms that would impede an independent prosecution. At the July 2010 AU summit in Kampala, resolutions were adopted calling for member states to refuse to cooperate with the ICC over Darfur. The Malawian President Bingu wa Mutharika, the then President of the AU, condemned the ICC for issuing indictments that undermined "African solidarity and African peace and security that we fought [for] for so many years."¹⁴³ Indictments against Said Gaddafi in 2011 also prompted charges that the ICC was acting in an imperialist manner, as the indictment had been issued under Article 13(b) of the statute, which allows the Security Council to exercise its powers under Chapter VII of the UN Charter and request the prosecutor to begin an investigation into an ongoing situation. Libya was not a signatory to the Rome Statute, but the Security Council resolution overrode this legal barrier, leading to claims that the ICC had become imperialist, represented a new imperial order and supported Western military

¹⁴⁰ Bosco (n 138) 47.

¹⁴¹ C Ero, 'Understanding Africa's Position on the International Criminal Court' from *Debating International Justice in Africa* OTJR Collected Essays, 2008–2010

<http://www.fljs.org/sites/www.fljs.org/files/publications/Justice_in_Africa.pdf> accessed 4 December 2012.

¹⁴² Kurt Mills "'Bashir is Dividing Us': Africa and the International Criminal Court" (2012) 34 HRQ 404, 423.

¹⁴³ Al Jazeera, 'AU chief slams ICC Bashir warrants' 25 July 2010

<<http://www.aljazeera.com/news/africa/2010/07/201072571956380906.html>> accessed 4 December 2012.

interventions.¹⁴⁴ When in 2013 the ICC issued charges against the President of Kenya, Uhuru Kenyatta and his deputy, William Ruto, this led to an aggressive political campaign within Kenya condemning the ICC as imperialist, which prompted the Kenyan parliament to vote to withdraw Kenya from the organisation.¹⁴⁵

Security Council politics precluded action in states such as Sri Lanka, where the Defence Minister was suspected of committing crimes against humanity at the conclusion of its Civil War in 2009. This all contributed what Mahmood Mamdani described as the perception that it was a “Western court to try African crimes against humanity.”¹⁴⁶ This has led to anti-imperialist opposition, seriously damaging the ICC, as many powerful political leaders have defined inter-state solidarity around non-cooperation with the Court. When Al-Bashir attended a ceremony in Kenya in honour of their new constitution in August 2010, the Kenyan government refused to fulfil their obligations under the Rome Statute to arrest him.¹⁴⁷ In December 2014, the prosecution against Kenyatta collapsed; the Chief Prosecutor blamed the lack of co-operation from the Kenyan government, including a media campaign attacking the ICC as imperialist, for making the prosecution impossible.¹⁴⁸ Significantly, the anti-hegemonic criticism of the ICC highlighted the potential for it to align with the interests of the elites within postcolonial states. It is very important to distinguish general anti-hegemonic critique of international human rights law from the practice of anti-hegemonic ideological opposition to human rights organisations. The former can serve to highlight the residual imperialism in international law and provide a template for reform, along the lines that theorists – such as Rajagopal – advocate. However, the latter is a political tool used by the elites in certain postcolonial states to strengthen their own power whilst simultaneously weakening the power of organisations to protect their own populations.

(ii) *Developmentalism and the Third World bloc: The Right to Development in International Law*

¹⁴⁴ See A Mackie, ‘Perceptions, Politics, and Peace: The Limits of Globalization in Legitimizing the International Criminal Court’ (2012) 30 *Macalester International* 132.

¹⁴⁵ See Roland Adjovi, ‘Kenya Withdrawal from ICC a Symptom of Political Brainwash’ *Jurist* 8 Oct 2013 <<http://jurist.org/forum/2013/10/roland-adjovi-african-brainwash.php>> accessed 20 September 2014.

¹⁴⁶ New African ‘ICC, A Tool To Recolonise Africa’ *New African* 1 March 2012 <<http://www.newafricanmagazine.com/special-reports/sector-reports/icc-vs-africa/icc-a-tool-to-recolonise-africa>> accessed 4 December 2012.

¹⁴⁷ Coalition for the International Criminal Court ‘President Al-Bashir’s visit to Kenya’ 17 September 2010 <<http://www.iccnw.org/?mod=newsdetail&news=4043>> accessed 20 September 2014.

¹⁴⁸ ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta’ ICC Press Release, 5 Dec 2014 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx> accessed 6 December 2014

Third World ideology had a distinctly material component in the form of Developmentalism. Althusser notes that the relationship of ideology to “conditions of existence” establishes a relationship between ideology, production and class relations, which endows the “imaginary relationship” of ideology “with a material existence.”¹⁴⁹ Developmentalism is the ideological pursuit of state-driven projects to achieve economic advancement in postcolonial states. At the time of independence, there were vast disparities between the economic statuses of First and Third World countries, giving foundation to the notion that juridical independence was not real independence. As detailed in the first and second sections of this chapter, material concerns – in particular economic and social rights – were marginalised in international human rights law. The right to development emerged as both a way of recognising human capacities in development and a mechanism for realising economic self-determination to compliment political self-determination.¹⁵⁰ In the 1960s, the idea that planned development could radically alter the material conditions of states was one that was taken seriously, as the rapid post World War Two recovery of the Soviet bloc offered an economic model that appeared to deliver results and was not directly associated with European colonial-imperialism.

Developmentalism and scrutiny of a state’s human rights record by an international organisation were not in principle incompatible, but in practice there were tensions. It was at the First World Conference on Human Rights in Tehran in 1968 that the Third World bloc began to use arguments for economic development to deflect human rights scrutiny. Princess Ashraf of Iran, the conference president, stated in her inaugural address that she had developed her “own ideas about what the most fundamental human rights were: the rights to food, shelter, clothing work ...and a basic education.”¹⁵¹ Even though, as Roland Burke noted, many of these rights were contained in the UDHR, Third World bloc delegates at the Tehran conference attacked the UDHR for being irrelevant or imperialist.¹⁵² The rhetoric on economic and social rights at the conference, and subsequently at the UN, framed human rights and developmentalism as being completely incommensurable.¹⁵³ Developmentalism thus subordinated individual rights (both civil and political, and economic and social rights) and had the potential to generate incidents of systemic state oppression.¹⁵⁴

¹⁴⁹ Althusser (n 48) 41.

¹⁵⁰ See Giles Mohan and Jeremy Holland, ‘Human Rights & Development in Africa: Moral Intrusion or Empowering Opportunity?’ (2001) 28 *Review of African Political Economy* 177.

¹⁵¹ Opp Cite Roland Burke (n 2) 99.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ For examples see Rhonda Howard, ‘The Full Belly Thesis: Should Economic Rights Rake Priority over Civil and Political Rights? Evidence from Sub Saharan Africa’ (1983) 5 *HRQ* 467.

After the Tehran conference, several states from the Third World bloc continued to maintain that developmental priorities should outweigh the protection of human rights; Senegal's representative to the UN Commission on Human Rights argued that citizens of the Third World bloc had "neither the material, nor the intellectual, nor the physical capacity" to enjoy human rights.¹⁵⁵ Burke described this type of argument as "destroying rights in order to save them", and it gained currency amongst some postcolonial states at the Commission.¹⁵⁶

The 1976 Universal Declaration of the Rights of Peoples, sometimes known as the Algiers Declaration, was drafted by the Third World bloc and was part of the wider cannon of NIEO proposals. It posited that the "Economic Rights of Peoples" were necessary to act as remedies against "new forms of imperialism" which "oppress and exploit the peoples of the world."¹⁵⁷ As Richard Falk notes, the declaration does not contain a single reference to international human rights law, and overlooked human rights abuses that could occur within Third World societies.¹⁵⁸ One significant problem of developmentalism, and one that may explain its seeming incommensurability with the protection of human rights, was that it was essentially concerned with protecting the material condition of the state, not the individual. A good example of this is the relative lack of consideration that individual economic rights received from the Third World bloc. The non-justiciable status of the ICESCR had been opposed by Pakistan and Egypt during its drafting in the 1950s, but in 1966, when many more postcolonial states were involved in decision-making processes, states within the Third World bloc opposed the creation of a review body for the ICESCR.¹⁵⁹ Arguments about the importance of state development were often implicitly projected against a liberal model of economic development, which was implicitly associated with the economic policies of former colonialist states. The problem was that this approach to developmentalism also entailed subordinating community and individual interests to the state and greatly strengthening the

¹⁵⁵ UN Doc GA/3845/HRD/50.

¹⁵⁶ Roland Burke, 'Some Rights Are More Equal than Others: The Third World and the Transformation of Economic and Social Rights' (2012) *Humanity Journal* 427, 438.

¹⁵⁷ Universal Declaration of the Rights of Peoples, Algiers, 4 July 1976 <http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm> accessed 26 June 2015.

¹⁵⁸ Richard Falk, 'Comparative protection of Human Rights in Capitalist and Socialist Third World Countries' (1979) 1 *Universal Human Rights* 3, 19.

¹⁵⁹ Michael Dennis and David Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *AJIL* 462.

power of postcolonial elites, who would for the most part be in charge of managing and reaping the rewards from development.¹⁶⁰

The 1986 UN Declaration on the Right to Development was the first major human rights document to advance developmentalism. This wasn't a continuation of the NIEO, but rather an attempt to use international human rights law to create a right to development that was interdependent – a right needed to facilitate the delivery of other rights – and that would have equal priority with other rights. Commenting on the Declaration, Philip Kooijmans noted that the right to development was defined as “an inalienable right” that was necessary to realise all human rights and fundamental freedoms.¹⁶¹ Crucially, the Declaration emphasised the importance of individual rights, referring to the ICCPR and the ICESCR and emphasised that the “enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.”¹⁶² Its passage was near unanimous in the General Assembly, although the US voted against it, which delayed the process of implementation for several years.¹⁶³

Substantively, however, the right to development was prone to internal incoherence, as it failed to identify either the content of the right or the duty holder.¹⁶⁴ In practice, as Phillip Alston noted, governments often used the right to development “as an arena of last refuge in which to relocate many of [their] old ideological and political struggles.”¹⁶⁵ The association between developmentalism and authoritarian governments did not help the promotion of the right to development, which in turn meant that support for it within key international institutions – such as the World Bank – was not forthcoming.¹⁶⁶ Cases such as Indonesia under Suharto, where rights violations were carried out in pursuit of economic development, were closer to the developmentalism pursued at the Tehran conference in 1968, which was a form of authoritarian apologism, rather than the interdependent right contained in the 1986 Declaration; although crude associations between developmentalism and authoritarianism often had a trace of residual imperialism in them. Even after 1986, the idea of a right to development remained ideologically unpopular with key stakeholders in international

¹⁶⁰ For a good example how elites in postcolonial states controlled developmentalism see Jean-François Bayart, *The State in Africa: The politics of the Belly* (Polity 2009) 6-7.

¹⁶¹ Phillip Kooijmans, ‘Human Rights- Universal Panacea: Some reflections on the so-called human rights of the third generation’ (1990) 37 *Netherlands International Law Review* 315, 325.

¹⁶² A/RES 41/128, 4 December 1986 Preamble.

¹⁶³ Arjun Sengupta, ‘Right to Development as a Human Right’ (2001) 36 *Economic and Political Weekly* 2527.

¹⁶⁴ Jack Donnelly, ‘In Search of the Unicorn the Jurisprudence and Politics of the Right to Development’ (1985) 15 *California Western International Law Journal* 473.

¹⁶⁵ Phillip Alston, ‘Peoples Rights: Their Rise and Fall’ in Phillip Alston (eds.) *Peoples Rights* (OUP 2001) 283 -285.

¹⁶⁶ Anne Orford, *Globalization and the Rights to Development* in Alston (n 165.) 134-35.

economic institutions, many of whom were formerly colonialist states. The problem was that the Declaration did nothing to resolve what David Kinley termed the responsibility dilemma between states, as framing development as a right was not going to resolve the basic tension between Western states who claimed that the development was a political instrument used by Third World governments, and postcolonial states who argued development was a right.¹⁶⁷ As a consequence, Yash Ghai noted, a wider perception was created among Third World states that “developed countries were united in their opposition” to the Declaration, which, in the eyes of some states, appeared to be a case of Western double standards.¹⁶⁸ A renewed interest in the right to development emerged in the early 2000s; in 2004, the UN set up a High Level Task Force on the Right to Development, which from 2009 began investigating how the Declaration could be used to achieve the aims of Millennium Development Goal 8 – the creation of a global partnership for development.

The right to development could have been a remedy to the residual imperialism of international law; however, the Third World bloc often used developmentalism to attack human rights more generally, and shield themselves from the scrutiny of international human rights organisations. To an extent, this attitude changed with the 1986 Declaration, which could have been a significant example of the reprioritisation of international human rights law on anti-imperialist lines. Instead, a combination residual imperialism and ideological opposition from the US helped derail this process, resulting developmentalism remaining synonymous with authoritarianism.

(iii) *Defensive Relativism : The ‘Asian Values’ debate and the ASEAN human rights commission*

Defensive relativism is the practical application of cultural relativism to oppose the functioning of human rights organisations. International human rights law does not, in the majority of cases, doubt the plurality of culture, but attempts to set universal minimum standards that allow a significant degree of subsequent diversity.¹⁶⁹ It is possible to be sceptical of universal claims, as Bonny Ibhawoh is, and argue that there are important traditions of cultural dignity within African societies that can also protect rights.¹⁷⁰ Cultural relativism is not a doctrine of morality – it is metaethical explaining of how moral decisions

¹⁶⁷ David Kinley, *Civilising Globalising: Human Rights and the Global Economy* (CUP 2009) 107.

¹⁶⁸ Yash Ghai, ‘Human Rights and Governance: The Asia Debate’ (1994) 1 *Asia Pacific Journal on Human Rights and the Law* 1, 10.

¹⁶⁹ For a description of balancing human rights claims see Eva Brems, *Human Rights Universality and Diversity* (Martinus Nijhoff Publishers 2001) 341-364.

¹⁷⁰ Bonny Ibhawoh, ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State’ (2000) 22 *HRQ* 838.

are to be made, not what those decisions are – thus, in the case of cultural relativism, as Stephen Lukes notes, “the authority of moral norms is relative to time and place.”¹⁷¹ Defensive relativism describes an argument advanced by a state party justifying non-compliance with a human rights organisation on the basis that the rights that it protects are incommensurable with the culture in their jurisdiction. The Declaration and Programme of Action from the 1993 Second World Conference on Human Rights in Vienna, contained a passage that appear to legitimise defensive relativism. In Article 5 it stated that the “significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind” in the application of international human rights law.¹⁷² Although its meaning was fiercely debated afterwards, the presence of this provision was in part an acknowledgement of the growing importance of cultural relativism as a state practice among states in the Third World bloc.¹⁷³

Defensive relativism is based on cultural absolutism, which is an extreme variety of moral relativism, rather than a distinct epistemic claim.¹⁷⁴ Rhonda Howard defines cultural absolutism as a philosophical position that declares a society’s culture to be of “supreme ethical value” and advocates “ethnocentric adherence to one's own cultural norms as an ethically correct attitude for everyone except loosely-defined ‘Westerners’”.¹⁷⁵ This makes it possible, Howard argues, for forms of cultural absolutism to arise in Western democracies, noting that in debates about multi-racialism in Canada, the defence of cultural values was used to justify positions such as “immigration must be carefully controlled” and “[no one] would want to live in the same community as blacks.”¹⁷⁶ Absolutist-relativism, Amanda Pollis cautions, can lead to claims of cultural distinctiveness from governments that are in fact a “wanton exercise of power by the elites” using ‘culture’ as a justification for wider human rights abuses.¹⁷⁷ Jack Donnelly notes that absolutist arguments were used in the 1970s by “vicious dictators” who “regularly appealed to culture to justify their depredations.”¹⁷⁸ Whilst built on absolutism defensive relativism when used as a form of anti-imperialist ideological opposition often used the language of limitations of existing human rights or the need for

¹⁷¹ Stephen Lukes, *Moral Relativism* (Profile Books 2009) 16.

¹⁷² 1993 Vienna Declaration and Programme of Action A/CONF.157/23, Art 5.

¹⁷³ See Markus Schmidt ‘What Happened to the ‘Spirit of Vienna’ (1995) 64 Nordic Journal of International Law 591, 597-8.

¹⁷⁴ Incommensurability is often used in epistemic relativism to describe the incompatibility between two frames of epistemic reference. See Michael Krausz, ‘Varieties of Relativism and the Reach of Reasons’ in Steven Hales (eds), *A Companion to Relativism* (Wiley Blackwell 2011).

¹⁷⁵ Rhoda Howard, ‘Cultural Absolutism and the Nostalgia for Community’ (1993) 15 HRQ 315.

¹⁷⁶ *ibid.* 323.

¹⁷⁷ Amanda Pollis, ‘Cultural Relativism Revisited: Through a State Prism’ (1996) 18 HRQ 316, 323.

¹⁷⁸ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 26 HRQ 281, 282.

human rights to be reprioritised. One political factor driving defensive relativism in international organisations was the growth of religious and cultural politics in some Third World bloc states, following the 1979 Iranian revolution. By the late 1980s, what Prashad termed a “cruel, cultural nationalism” had replaced the trademark secular anticolonial nationalism of the Third World bloc; in practical terms, this meant that in international organisations the Third World bloc states advanced defensive relativist arguments, even if they did not subscribe to a particular religion or cultural tradition.¹⁷⁹ As Anthony Appiah notes, there is a danger for postcolonial literature to idealise or venerate the pre-colonial and construct an idealised past as a methodological foil to the supposed modernity of colonialism.¹⁸⁰ The political expropriation of tradition was in part a mechanism for states to oppose the universal rights protected by an international human rights organisation.

The Asian values debate, which began at the 1993 Bangkok conference – a regional meeting held prior to the 1993 Vienna Conference – was a major example of defensive relativism; although it should be noted that rather than being a response to a specific human rights instrument, it was a reaction against human rights more generally. The declaration from the Bangkok conference recognised the importance of human rights, but argued that “the significance of national and regional particularities and various historical, cultural and religious backgrounds” should be taken into account when applying human rights standards.¹⁸¹ This statement was highly ambiguous, as seemed to both advocated human rights protection and their being superseded by cultural particularities.¹⁸² These general principles were accompanied by a wider questioning of the role of the individual within the legal system, and a general defence of absolutist rule justified by reference to ‘Asian culture’ or ‘Asian values’. Then Malaysian Prime Minister Mahathir Mohammed argued that although democracy was useful, Asians “should respect authority because it guarantees stability” and that political processes, such as challenging political leaders, were ‘treachery’ according to Malay tradition.¹⁸³ These arguments were echoed by the Singaporean senior minister, Lee Kuan Yew, who argued that Singaporean society valued “discipline more than democracy”, and that other Asian societies should follow its example.¹⁸⁴

¹⁷⁹ Vijay Prashad, *The Darker Nations: A Peoples History of the Third World* (New Press 2007) 223.

¹⁸⁰ Anthony Appiah, ‘Out of Africa Topologies of Nativism’ in Dominick LaCapra (ed.), *The Bounds of Race: Perspectives on Hegemony and Resistance* (Cornell University Press 1991).

¹⁸¹ UN Doc. A/CONF.157/ASRM/8 A/CONF.157/PC/59, 7 April 1993

¹⁸² Donnelly (n 176) 113.

¹⁸³ M Sani, ‘Mahathir Mohammed as a cultural relativist: Mahathirism on human rights’ paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia in Melbourne 1-3 July 2008 <<http://arts.monash.edu.au/mai/asaa/mohdazizuddinmohdsani.pdf>> accessed 4 June 2015.

¹⁸⁴ Mark Thompson, ‘Whatever Happened to “Asian Values”?’ (2001) 12 *Journal of Democracy* 154, 156.

Asian values appeared to be promoting a form of “soft authoritarianism”, which ostensibly favoured the reprioritisation of rights rather than their elimination.¹⁸⁵ For example, Mahathir also announced that he wanted a review of the UDHR in its entirety – because it had been developed by “superpowers” – and suggested that the imposition of extra-cultural human rights standards was a form of imperialist oppression.¹⁸⁶ Whilst this argument could be read as a case for the reprioritisation of international human rights law, its effective conclusion was that human rights law outside the direct control of the government ought to be rejected. As Abdullahi An-Na’im argued, governments in South East Asia by their treatment of political dissent and their human rights abuses, undermined and repudiated “the same culture and community in whose name it claims to speak.”¹⁸⁷ There was also a tendency to conflate culture and sovereignty. Indonesian Foreign Minister Ali Alatas, in a statement to the UN General Assembly in 1993, argued that “human rights ...are unquestionably of universal validity”, but that complex cultural realities meant that implementation had to be assessed in the “national context.”¹⁸⁸ This was not only a matter of competence and expertise, but was a “logical consequence of the inherent right of nations to [their] cultural identity.”¹⁸⁹ This conflation allowed for the defence of sovereignty to be turned into a defence of culture – something Howard had explicitly cautioned against – as it allowed elite politicians to decide the terms of culture in a manner that aligned with their own interests.¹⁹⁰

Asian values as a form of pre-emptive ideological opposition were institutionalised in the Association of South East Asian Nations (ASEAN) Human Rights Declaration. After the 1993 Vienna Conference, an ASEAN Ministerial Meeting issued a resolution calling for the creation of a regional human rights organisation, which progressed slowly for much of the next decade. In 2007, a revised ASEAN Charter contained references to a human rights mechanism, but these were described as “threadbare” by one commentator, and, as the previous chapter noted, these provisions were framed in a way so as to eliminate any ipsetic potential.¹⁹¹ Significantly, Article 14 of the Charter stated that any such organisation would have to operate in “conformity with the purposes and principles of the Charter”. This brought in Article 2 of the Charter, entitled “Principles”, which had three separate references to some

¹⁸⁵ Mark Thompson, ‘Pacific Asia after ‘Asian Values’: Authoritarianism, Democracy, and ‘Good Governance’ (2004) 25 TWQ 1079

¹⁸⁶ Rhonda Howard, ‘Human Rights and the Culture Wars: Globalization and the Universality of Human Rights’ (1997) 53 *International Journal* 94 111.

¹⁸⁷ Abdullahi An-Na’im, ‘The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia’ in James Bauer and Daniel Bell (eds), *The East Asian Challenge to Human Rights* (CUP 1999) 155.

¹⁸⁸ JS Mills, *Human Rights in the Emerging Global Order: A New Sovereignty* (Palgrave 1998) 48.

¹⁸⁹ *ibid.*

¹⁹⁰ Howard (n 175).

¹⁹¹ Yuval Ginbar, ‘Human Rights in ASEAN Setting Sail of Treading Water?’ (2010) 10 HRLR 504, 512.

form of defensive relativism as it committed the organisation to respect the “national identity” of member states, recognised the right of member states to “lead its national existence” and required respect for the different “cultures” of member states.¹⁹² These terms were so opaque that they seemingly left unfettered room for a state to claim that the exercise of a protection mandate by any future human rights organisation was a violation of the principles of the Charter, as it disrespected their national culture and their right to national existence. This act of pre-emptive ideological opposition institutionalised defensive relativism and severely limited the development of the ASEAN Intergovernmental Commission on Human Rights (AICHR).

The 2012 ASEAN Human Rights Declaration stated that the “realisation of human rights must be considered in the regional and national context”, again providing another relatively open-ended provision that would directly facilitate defensive relativism.¹⁹³ As Nicholas Doyle notes, various provisions in Declaration seem to echo the disagreements among the drafters about what human rights are and what they should protect.¹⁹⁴ Tan Hsien-Li argued that the creation of the AICHR represented a “softening” of ASEAN states towards human rights; however, the inclusion of language within its legal structure that virtually duplicated the 1993 Bangkok Declaration suggests that an alternate explanation would be that ASEAN states got what they wanted from a human rights organisation without really changing their views.¹⁹⁵ ASEAN states maintained that this broadly aligned with the idea of creating an organisation that followed the ‘ASEAN way’ of building consensus and respect, and the Indonesian delegate to the panel that drafted the AICHR’s terms of reference argued that dialog could over time provide remedies to individuals that had suffered human rights violations.¹⁹⁶ This claim, however, needs to be seen in the context of the Asian values debate more broadly, where claims of culture more generally were used to ideologically oppose the operation of international human rights organisations. Whilst it is possible that the ASEAN human rights commission may evolve and utilise a dialogic and non-confrontational approach to protect human rights, the inclusion of such open-ended provisions directly facilitates the capacity of

¹⁹² Art .2 ASEAN Charter <<http://www.asean.org/archive/publications/ASEAN-Charter.pdf>> accessed 12 May 2013.

¹⁹³ Art .7 ASEAN Human Rights Declaration <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>> accessed 24 May 2015.

¹⁹⁴ Nicholas Doyle, ‘The ASEAN human rights declaration and the implications of recent Southeast Asian initiatives in human rights institution-building and standard-setting’ (2014) 63 ICLQ 67.

¹⁹⁵ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in South East Asia* (CUP 2011) 162-3.

¹⁹⁶ For reference to ASEAN state response see Daniel Seah, ‘The ASEAN Charter’ (2009) 58 ICLQ 197,208 and James Munroe ‘The relationship between the origins and regime design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)’ (2011) 15 IJHR 1185, 1190.

states to push back against any such evolution of its protection mandate.

Conclusion

If as An-Na'im writes, human rights "are supposed to be the rights of every human being", they implicitly transcend states jurisdictions and presuppose a common agreement about the content of rights.¹⁹⁷ As illustrated in the first section of this chapter, international human rights law was not a reflection of a consensus about what all states would deem as rights worth protecting. It was instead a reflection of a particular set of practices designed to protect human interests and capabilities, which a set of countries agreed to place into instruments imposing legal obligations. As such, international human rights law reflected a set of ideological preferences and could be used to advance a particular ideological cause. Whilst these two propositions are ultimately interrelated, due to the residual imperialism of international law, it is necessary to treat them as distinct in order to understand the different forms of Third World bloc anti-imperialism. The protection of human rights has also been used to justify neo-imperialist practices, such as humanitarian intervention, which inspired anti-imperialist opposition of the sort described in the third section of this chapter. This form of anti-hegemonic ideological opposition directly challenges the use of human rights as a justification for acts of neo-imperialism, but simultaneously also protects leaders of government within Third World states that commit human rights abuses.

The second section of this chapter demonstrated how international human rights law's content reflected a particular conception of human rights, which left it open to the criticism that it was imperialist. As RP Anand argued, with reference to international law in general, it had been created for Western nations "with a common cultural background and strong liberal individualistic features" and was unsuitable for a "heterogeneous world society".¹⁹⁸ International human rights law, in its early stages, was no exception to this general trend; although it ought to be emphasised that as postcolonial states gained independence and entered into international organisations, their capacity to alter the substance of international law grew, as the case study of the right to development in the third section of this chapter illustrated. However, as even Third World Approaches to International Law (TWAIL) scholars acknowledge, ideological opposition from the Third World bloc did not produce a coherent

¹⁹⁷ An-Na'im, 'The Interdisciplinarity of Human Rights' in Conner Gearty and Costas Douzinas (eds.), *The Cambridge Companion to Human Rights Law* (CUP 2012) 97.

¹⁹⁸ RP Anand, 'Attitude of Asian-African States Towards certain Problems of International Law' in Frederick Snyder and Surakiart Sathirathai (eds.), *Third World Attitudes to International law* (Martinus Nijhoff 1987) 10.

programme for reforming the substance of international human rights law.¹⁹⁹ Instead, much as was the case with institutional opposition outlined in the previous chapter, anti-imperialist ideological opposition often simply attacked international law as being a Western ideology. This was what lay behind defensive relativism, where international law's claim to universalism was attacked as being a reflection of assumptions about Western supremacy. As the final case study in section three demonstrates, anti-imperialist opposition persisted within regional organisations; the AIHRC was designed to institutionalise defensive relativism, making the entire structure of the organisation a form of pre-emptive anti-imperialist ideological opposition. The AIHRC is an interesting example of what this overall study seeks to analyse; it was created outside of the imperialist context of international law, reflecting the collective values of states in the region, and yet was subject to anti-imperialist opposition. This sort of pre-emptive opposition can be read, as the previous chapter argued as a form of rational design; states deliberately developed the organisation to reflect their interests, in this case these interests were rooted in a form of cultural absolutism that institutionalised defensive relativism.

Anti-imperialist ideological opposition was caught by the lack of either an ideological alternative to international human rights law, or a distinct political programme for its reform. The numerous academic projects on the reform of international law, such as the TWAIL movement, should be distinguished from the behaviour of the Third World bloc (and latterly the Afro-Asian caucus) in international organisations.²⁰⁰ Even then, TWAIL is explicitly and implicitly criticised in a number of sources for being a diagnostic and analytical tool, rather than advancing a distinct programme for ideological reform.²⁰¹ Within international organisations, states engaging in ideological anti-imperialism were correct in their diagnosis of the problem of international human rights law's origins and application, but often, ideological opposition resulted in a crude defence of the governments of postcolonial states. This is further illustrated in the next chapter, which analyses the UN Human Rights Commission and Council, where both institutional and ideological opposition quite often was a method for defending states from the Third World bloc that were committing human rights abuses.

¹⁹⁹ See BS Chimi, 'Third World Approaches to International Law: A Manifesto' (2006) 8 ICLR 3.

²⁰⁰ For an example see M Shiviah, 'Human Rights and the Third World: Towards a Reassessment of Ideological Dynamics' (1995) 30 Economic and Political Weekly 2937.

²⁰¹ Obiora Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 Osgoode Hall Law Journal 171.

What chapter four illustrates, with an analysis of the African Charter, is that many of the concerns about the ideological reprioritisation of international human rights law could be addressed and developed into a genuinely decolonial human rights instrument. This fulfilled Mignolo's definition of the decolonial, as it used "new epistemes or new paradigms" and was built upon a "common ground or vision of the future."²⁰² Crucially, the African Charter removed international human rights law from its imperialist context, and, notionally at least, rendered anti-imperialist ideological opposition largely irrelevant. It was a decolonised human rights instrument in the sense that it drew from distinctly postcolonial experiences to define the contents of human rights law. However, as the examination of the AIHRC over the last two chapters demonstrates, anti-imperialist opposition can be incorporated into the design of regional organisations in a form of pre-emptive opposition. This is due in part to a conflation of sovereignty and culture, which can lead to the creation of institutions with deliberately weak protection mandates, which also occurs in the institutions designed to enforce the African Charter.

Anti-imperialist ideological opposition of the anti-hegemonic and the cultural absolutist forms, could not be adequately addressed by the creation of decolonial human rights instruments, as they were largely proxies for the defence of sovereignty. As the next chapter illustrates, there was often some overlap between anti-imperialist institutional and ideological opposition within the UN Human Rights Council and Commission, which revolved around the protection of the postcolonial state, to both safeguard against its own weaknesses and protect against the presumed hegemony of international law. What these forms of anti-imperialist ideological opposition and the persistence of different forms of anti-imperialist institutional opposition discussed in the previous chapter, point to is that the legal structure of human rights organisations may cause anti-imperialism. Chapter five will argue that organisational protection mandates are inherently imperialist, and that this explains the persistence of anti-imperialist institutional and ideological opposition. Despite attempts to decolonise or propose an agenda for the reform of international human rights law, the legal structure of human rights organisations remains inherently imperialist due the structure of organisational protection mandates.

²⁰² Mignolo (n 14).

CHAPTER THREE

Opposition at the UN Commission on Human Rights and Human Rights Council

Introduction

At the 1944 Dumbarton Oaks conference, which drafted the instruments founding the UN, references to human rights were included as something of an afterthought.¹ Until the formalisation of the UN Commission on Human Rights' (the Commission) protection mandate in 1970 the UN had no formal mechanism for protecting human rights within states. A protection mandate describes the legal powers that an organisation possesses to hear petitions from individuals in member states or to scrutinise a state's legislation for compliance with international human rights law. This is sometimes referred to as the structure of an international organisation.² The Commission originally had a purely promotional mandate and in its first decade it spent much of its time drafting the human rights covenants which were designed to turn the Universal Declaration of Human Rights (UDHR) into two international treaties; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It was the campaign against apartheid, which was driven by the Third World bloc and went across UN institutions, that led to the creation of the Commission's protection mandate.³

Article 2(7) of the UN Charter seems to preclude the operation of a protection mandate as it prohibits the UN from intervening "in matters within the domestic jurisdiction of any State."⁴ Article 55 and 56 of the Charter requires states to respect human rights, but without any specific mechanism for their monitoring or enforcement.⁵ Under Article 5 and 6 of the Charter a state can theoretically be removed from the UN for committing human rights violations in their own jurisdiction, but in practice this never happened. Apartheid South Africa was excluded from the General Assembly, but it was never expelled from the UN entirely.⁶ The Security Council has powers to authorise military intervention "to maintain or restore

¹ Roger Normand and Sarah Zaidi *Human Rights at the UN: The Political History of Universal Justice* (Indiana University Press 2008) 112-6.

² See Kal Raustiala 'Form and Substance in International Agreements' (2005) 99 AJIL 581.

³ This chapter, following the introductory chapter, uses the term Third World bloc to describe the ideological alliance of postcolonial states in international organisations. After 1995 the term Afro-Asian bloc is used or the blocs are referred to by reference to their geographic location.

⁴ 1945 Charter of the United Nations, 892 UNTS 119, Art 2(7).

⁵ Ibid. Art 55 – 6.

⁶ Alison Duxbury *The participation of states in International Organisations: The Role of Human Rights and Democracy* (CUP, 2011) 109-17.

international peace and security”, which have been used to protect human rights.⁷ However, the Security Council can only act where human rights abuses within a state are at risk of creating a wider international security threat and as chapter two of this study outlined, due to neo-imperialist politics these powers are sporadically applied.

This chapter shows how postcolonial states, through the Third World bloc in both the Commission and later the UN Human Rights Council (which replaced the Commission in 2006) engaged in anti-imperialist opposition and the driving factor for this was the application of these organisations’ protection mandates. Institutional opposition, as chapter one argued, is a reaction to an organisation’s protection mandate and takes the form of a reassertion of state sovereignty. Protection mandates give the organisation what chapter one described as an ipsetic potential – the capacity to make an authoritative claim as to what a state’s law ought to be, giving the organisation an authoritative and rival claim to the state as a law maker. This varies in intensity depending on the nature of an organisation’s protection mandate. The Council and Commission are what Lawrence Helfer and Anne-Marie Slaughter term political organisations in that they are comprised of delegates from member states and are dependent on political processes and political pressure rather than international legal obligations, to enforce their decisions.⁸ Anti-imperialist institutional opposition was predicated on the notion that postcolonial states’ sovereignty was relatively unequal to other states, in particular formerly colonialist states. Because of this international law became an instrument for perpetuating inequalities on postcolonial states or weakening their sovereignty and international organisations were a means of continuing these inequalities. The UN and other international organisations were residually imperialist as their legal structure preserved the power and privileged position of formerly colonialist states which, as chapter one argues, led to a sense amongst states in the Third World bloc that their membership of international organisations perpetuated imperialist dominance. This chapter shows how this persisted even after the demise of the Third World bloc in the early 1990s.⁹ Postcolonial states in the African and the Asian regional blocs often worked together in the Commission and the Council (the Afro-Asian bloc) to collectively engage in anti-imperialist opposition.

Ideological opposition, as chapter two detailed, was where states opposed human rights organisations because of a philosophical objection to the content and nature of the

⁷ Art 42 (n 4).

⁸ Laurence Helfer and Ann-Marie Slaughter ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 The Yale Law Journal 273.

⁹ After or around 1995 the Third World bloc declined as a political force – See Mohammed Ayoob ‘The New-Old Disorder in the Third World’ (1995) 1 Global Governance 59.

international human rights law the organisation was tasked with protecting. Anti-imperialist ideological opposition came in two forms; anti-hegemonic ideological opposition was predicated on the notion that international human rights law was a neo-colonialist tool used by former colonialist states to justify the oppression of postcolonial states which meant that the institutions set up to enforce it needed to be opposed. There were also arguments that international human rights law needed to be decolonised by reprioritising its substance to accommodate the needs of postcolonial states, such as allowing different cultural values to be recognised (defensive relativism) or to recognise the material needs of states (developmentalism). As the previous chapter argued the decolonisation of international human rights law would remove it from the imperialist context of its origins and expand the type of interests protected. Anti-imperialist ideological opposition at both the Council and Commission was however relatively unconcerned with decolonising international human rights law and more focused upon anti-hegemonic opposition. It is the application of protection mandates at UN institutions, this chapter argues, which tends to generate anti-imperialist forms of opposition. This chapter examines this general trend by looking at the formation and decline of the Commission's protection mandate, and the role anti-imperialism played in the process before examining how anti-imperialist opposition was still present at the Council. This will be illustrated further in the next chapter with an analysis of anti-imperialist opposition towards regional organisations before in the final chapter assessing the features of protection mandates that are inherently imperialist meaning that they will trigger anti-imperialist opposition regardless of the rights that an organisation is tasked with enforcing.

The first section of this chapter looks at the origins of the Commission's protection mandate in the context of the wider campaign by the Third World bloc against apartheid at the UN. Whilst this made the Commission more powerful the Third World bloc resisted the Commission investigating situations outside of apartheid and actively defended a form of double standards whereby states from the Third World bloc were not considered by the Commission, even though there were extensive complaints of human rights violations within some states. This was a form of anti-imperialist opposition and eventually led to the Commission's replacement with the Council which was meant to be less overtly politicised. However, the Universal Periodic Review (UPR) process and other parts of the Council's work were also subject to forms of anti-imperialist opposition from the Afro-Asian bloc. In a sense anti-imperialist opposition was readily explicable given the residually imperialist nature of the UN and the highly politicised nature of human rights in political bodies. Yet what is significant is the

correlation between anti-imperialism from the Third World bloc and the operation of protection mandates.

(1) Anti-imperialist opposition to the UN Commission on Human Rights: 1967-2006

Under Article 62 of the UN Charter the Economic and Social Council (ECOSOC) is authorised to make “recommendations for the purposes of promoting ... human rights”. The Commission was a sub-body of ECOSOC created in 1946 which did not have the power to hear individual petitions and confined itself to promotional work.¹⁰ This was done largely at the instigation of Western powers, particularly the British and Australians, who successfully blocked proposals from the Philippines and Chile to create an independent organisation with its own bill of rights.¹¹ The Commission did receive complaints from individuals but they had to be received in complete confidence – information about the complaints received between 1951 and 1952 showed that the majority were concerned with religious liberties or political freedom – but there was no mechanism for considering the complaints and holding states to account.¹² In a 1951 Article Edgar Turlington, an American academic, described the Commission’s functions in terms of advancing the values contained in the UDHR by “teaching and education and by progressive measures”.¹³ The Commission’s membership was decided by ‘slate vote’ of ECOSOC members which meant that a list of countries seeking membership from each of the UN’s regional groupings was simply provided and approved by ECOSOC. The Commission met annually for a single period of six weeks in Geneva where it deliberated resolutions and organised other activities.

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) was set up in 1947 to conduct studies and make recommendations to the Commission on the prevention of discrimination. It consisted of 12 independent experts, elected by the Commission and acting in their individual capacities - by virtue of being an expert body it had a significant ipsetic potential.¹⁴ It did not initially have a specific mandate to hear individual cases of discrimination. Both ECOSOC Resolution 75 in 1947 and resolution 728 in 1959 on individual communications affirmed the “no power to take action” doctrine leaving

¹⁰ Nihal Jayawickrama *The Judicial application of Human Rights Law: National, Regional and International Jurisprudence* (CUP 2002) 140-44.

¹¹ Tom Farer ‘The United Nations and Human Rights: More than a Whimper Less than a Roar’ (1987) 9 HRQ 550,555.

¹² John Humphry *Human Rights and the United Nations A Great Adventure* (Transnational Publishers 1984) 20

¹³ Edgar Turlington ‘The Human Rights Commission at the Crossroads’ (1951) 45 AJIL 534.

¹⁴ See chapter one for an overview of this.

the Sub-Commission without a protection mandate.¹⁵ The creation of bodies with the right to petition under Optional Protocol 1 of the ICCPR and the Convention on the Elimination of Racial Discrimination (CERD) in the 1960s provided a template for a protection mandate. As part one of this section demonstrates, the campaign against apartheid provided the impetus for the creation of a protection mandate at the Sub-Commission. The individual complaints procedure, known as the 1503 procedure after the resolution that created it, allowed individuals to send in petitions detailing human rights abuses, which were then heard in confidence at the Sub-Commission's annual sessions in Geneva.¹⁶ Overall the power of its protection mandate was essentially exhortatory but in that respect, it had some considerable influence especially in respect of Chile and other South American states which experienced military dictatorships.

In 1967 the Third World bloc was able to collectively command just under half the votes at the Commission and from this point apartheid and the struggle against colonial and minority rule dominated the Third World bloc's engagement with the Commission. As the second part of this section argues, this led to the shaping of double standards on human rights in Commission where the Third World bloc sought to target human rights abuses, committed by formerly colonialist states, and prevent the Commission from taking any action on human rights abuses in postcolonial states. Further expansion of the Commission in 1992 enhanced the strength of the Third World bloc. The end of apartheid in South Africa and the Cold War meant that the political dynamics, described in chapter one, which had created the conditions for the Third World bloc's inter-group cohesion diminished. This did not mark a shift in the Commission's political dynamics, instead Third World double standards morphed into a form of anti-hegemonic ideological opposition. Whilst this may be a basis for criticising acts of imperialism, as a form of opposition in international human rights organisations it proved an incredibly nihilistic doctrine that, as the final part of this section argues, resulted in the breakdown of Commission's protection mandate.

¹⁵ Manfred Nowak 'The Promotion and Protection of Human Rights by the United Nations' (1988) 6 Netherlands Human Rights Quarterly 5, 13.

¹⁶ For an overview of these procedures see ME Tardu 'United Nations Response to Gross Violations of Human Rights: The 1503 Procedure' 20 (1980) Santa Clara Law Review 559 and Howard Tolley 'Decision Making at the United Nations Commission on Human Rights' (1983) 5 HRQ 27.

(i) *The Third World bloc, anti-apartheid and the creation of a protection mandate for the Commission: The background to anti-imperialist opposition*

In the mid-1950s a variety of proposals to expand the UN's power to enforce human right standards were mooted including proposals from Sri Lanka to create an international criminal court and Uruguay to create a UN Attorney-General.¹⁷ The US proposed some reforms to the Commission but these were dismissed by contemporary commentators as "a euphemism for inaction" and driven by short-term political motivations.¹⁸ The prevailing sentiment in ECOSOC had been that giving the Commission or the Sub-Commission investigative powers would threaten state sovereignty, but as the Security Council after the 1960 Sharpeville massacre began to issue stronger anti-apartheid resolutions there was a shift in UN bodies towards a more activist anti-apartheid policy. Some authors argue that General Assembly Resolution 2144 in 1966 was a turning point as it urged ECOSOC and the Commission to improve the UN's capacity to stop human rights violations.¹⁹ However, Resolution 2144 was specifically framed in terms of the UN's "interest in combating policies of apartheid" and the preamble extensively referred to apartheid, minority rule and Portuguese colonialism.²⁰ Out of the resolutions 14 substantive points, nine of them referenced the apartheid and anti-colonialism and only three of them referred, directly or indirectly, to the protection human rights. The procedure under resolution 1235 in 1967 authorised the Commission to receive information about human rights abuses and engage in a "thorough study of situations which reveal a consistent pattern of violations of human rights."²¹

Under the final version of resolution 1235 the Commission and the Sub-Commission gained the power to consider "violations of human rights ... including policies of racial discrimination and segregation and of apartheid" and powers to investigate and study specific "human rights abuses".²² It was debatable whether this meant that the procedure was limited to human rights abuses in southern Africa or whether this was merely an illustration of the situations in which the Commission should act.²³ Article 3 of resolution 1235 stated that the Commission's investigatory powers were confined to cases such as those "exemplified by the policy of

¹⁷ Howard Tolley *United Nations Commission on Human Rights* (Westview Press 1987) 32-4.

¹⁸ Norman Bentwich 'Human Rights in the Doldrums' (1956) 1088 *Contemporary Review* 76, 79.

¹⁹ Bertrand Ramcharan *Contemporary Human Rights Ideas: Rethinking Theory and Practice* (Routledge 2008) 131-2.

²⁰ A/Res 2144(XXI) 26 Oct 1966.

²¹ ECOSOC Res 1235 U.N. Doc. E/4393 (1967) Art.3,

²² *Ibid.*

²³ Kevin Boyle 'The United Nations Human Rights Council: Origins, Antecedents, and Prospects' from K Boyle (eds.) *New institutions for human rights protection* (OUP 2009) 24.

apartheid as practised in the Republic of South Africa.”²⁴ During the drafting process Cameroon and Algeria had sided with the USSR and argued that resolution should be limited to situations of colonial rule but the final wording seemed to use apartheid as an example, not as an exclusionary term. But the phrasing of the provision – in particular the specificity of the location the abuses – “the Republic of South Africa and in the Territory of South West Africa” – meant that Third World states could argue that investigations should not occur outside of this context. In the early 1970s some African states argued that the Sub-Commission should not investigate matters outside southern Africa, even though significant racial discrimination persisted in many African states.²⁵ The 1235 procedure was bound to attract a degree of institutional opposition and as Boyle observes states from the Third World bloc, even though they had instigated its creation proved as “reluctant as other states” to the prospect of it being used in their jurisdiction.²⁶ Yet as Boyle goes on to note, there was a particular hostility to the mechanisms “engineered [to tackle] apartheid, colonialism and Israel” being used in Third World states.

The case for the Commission being able to receive individual petitions had been made for many years, but ECOSOC had resisted granting it this kind of power.²⁷ In July 1959 an ECOSOC Resolution rejected individual petition proposals, which were described by one contemporary source “the most elaborate wastepaper basket ever designed.”²⁸ Support for individual petition as Burke notes changed after 1960 when more African and Asian states joined the General Assembly and sought election to the Commission however, support for individual petition was limited to their “two main preoccupationsapartheid and colonialism.”²⁹ There was considerable support from the Third World bloc both for the Committee on Decolonisation (the Committee of Twenty-Four) and for a committee to hear petitions under the CERD. It was campaigning by the Committee of Twenty-Four on the issue of apartheid and decolonisation that led ECOSOC to reconsider individual petition. During the drafting process Tanzania tried unsuccessfully to introduce proposals that would require the Sub-Commission to focus exclusively on colonial situations and apartheid.³⁰ Other states from the Third World

²⁴ Res 1235 para.3.

²⁵ Warren Weinstein 'Africa's Approach to Human Rights at the United Nations' (1976) 6 A Journal of Opinion 14.

²⁶ Boyle (n 23) 27.

²⁷ Louis Sohn 'The improvement of the UN Machinery on Human Rights' (1979) 23 International Studies Quarterly 186, 202.

²⁸ John Humphry *Human rights & the United Nations: A Great Adventure* (Transnational Publishers 1984) 28.

²⁹ Roland Burke *Decolonization and the Evolution of International Human Rights* (U Penn Press 2009) 69.

³⁰ E/CN.4/L.991/ Rev.1 (1968) draft Resolution.

bloc along with Eastern European states also severely criticised the application of the process outside of southern Africa.³¹

The 1503 procedure Patrick Flood argues was “designed to provide a way for the Commission to evaluate situations amounting to consistent patterns of gross violations” of human rights and its procedure involved considering communications in private before activating wider political action from the Commission.³² European human rights activists initially praised the 1503 procedure for providing a forum for individuals to petition governments about their human rights abuses. Yet, the procedure, whilst providing an extensive mechanism for the processing of individual complaints, did not make communications public until the end of its own internal review process, when recommendations were transmitted to ECOSOC. Nor did it actually make the individual victim a party to the proceedings; as Tardu notes under the 1503 procedure the individual “plaintiff is an information transmitter” and there was no entitlement to have “his communication considered.”³³ The communications were processed by an expert working group and then referred to the Sub-Commission for consideration - around six to eight communications out of the hundreds received each year were processed during each Commission session. There was no mechanism for processing urgent communications received outside of the Sub-Commission’s annual meetings which as Tolley notes contributed to its failure to process complaints received about the Greek military junta in 1974.³⁴ The secrecy provisions had been strongly supported by the Third World bloc and the Soviet Union during the resolution’s drafting process. It was only in the final stage of the communication, after an interstate dialogue had failed to yield results, that the substance of the communication could be made public, as a means of ‘shaming’ the state in question about its human rights violations.³⁵ In 1978 the Sub-Commission went public with some of the complaints that it had received which included complainants from states in the Third World bloc such as Ethiopia, Indonesia, Malawi and Equatorial Guinea.

In a wider perspective the 1235 and the 1503 procedures were part of a wider campaign led by the Third World bloc to shift the Commission’s focus towards fighting apartheid because as Vincent noted it was seen by the Third World bloc as a continuation of the anti-colonial struggle.³⁶ During the early 1970s the Commission began issuing targeted resolutions against

³¹ Patrick Flood *The effectiveness of UN human rights institutions* (Greenwood Publishing Group 1998) 56.

³² Ibid.

³³ Tardu (n 16) 562.

³⁴ Howard Tolley ‘The Concealed Crack in the Citadel: The United Nations Commission on Human Rights’ Response to Confidential Communications’ (1984) 6 HRQ 420, 441.

³⁵ ECOSOC Resolution 1503 (XLVIII) U.N. Doc. E/4832/Add.1 (1970) (Res 1503).

³⁶ RJ Vincent *Human Rights and International Relations* (4th ed CUP 1991) 80, 94-5.

minority ruled states. The focus on apartheid should be seen both in terms of the number of Commission resolutions passed and the amount of time spent on the issue. From 1970-80 around 8% of all Commission meetings focused on South Africa specifically but when considering meetings on the issues of racism and self-determination – which were either proxies for attacking minority rule or apartheid – the Commission cumulatively spent around a quarter of its time on apartheid.³⁷ In the early 1980s resolutions on self-determination formed the highest proportions of targeted resolutions issued by the Commission, the majority aimed at South Africa.³⁸ The way apartheid dominated the Commission's agenda was arguably illustrative of the power of the Third World bloc; between 1967 and 1974 only South Africa and Israel were the subject of direct action under resolution 1235.³⁹ In the UN's wider work the Third World bloc were also successful at making apartheid a priority so much so that by 1995, half a century after the UN's founding, one fifth of all General Assembly resolutions passed had concerned apartheid.⁴⁰

The progressive advancement of Third World priorities led to claims from formerly colonialist powers during the 1970s (from the US in particular) that the Commission was becoming 'politicized'.⁴¹ Arguments about politicization ultimately favoured a narrow American "functionalist" view of international organisations which held that organisations should be confined to the powers granted to them by the states that originally created the organisation.⁴² During the Reagan administration criticism that the Commission was "anti-Western" grew with many critics citing as proof the growing power of the Third World bloc.⁴³ As the Commission had been originally created as a political and not a legal body, it was unsurprising that states would seek to pursue political strategies but the assumption was that this agenda would broadly be in a Western mould.⁴⁴ As Lyons *et al.* note the Commission was a major forum for the Third World bloc to "mobiliz[e] their combined force to argue for systemic changes".⁴⁵ It is important to note that US criticism of the Commission, of the sort outlined

³⁷ Jack Donnelly 'Human Rights at the United Nations 1955-85: The Question of Bias' (1988) 32 *International Studies Quarterly* 275.

³⁸ Ron Wheeler 'The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions' (1999) 32 *Canadian Journal of Political Science* 75.

³⁹ Complaints about other states were raised in debates – see Henning Bolke 'Western States, the UN Commission on Human Rights, and the '1235 Procedure': the 'Question of Bias' Revisited' (1995) 13 *NQHR* 367.

⁴⁰ Rosa Freeman *Failing to Protect: The UN and the Politicisation of Human Rights* (Hurst and Company 2014) 64.

⁴¹ Gene Lyons, David Baldwin and Donald McNemar 'The "Politicization" Issue in the UN Specialized Agencies' (1977) 32 *Proceedings of the Academy of Political Science* 81.

⁴² *Ibid.* 83.

⁴³ For an example of contemporary right wing criticism see A Eilan 'The General Assembly; Can it be salvaged' (Heritage Foundation 1984). For a historical assessment see Paul Kennedy *The Parliament of Man* (Penguin Books 2006) 188–191.

⁴⁴ See Christopher Roberts *The Contentious History of the International Bill of Human Rights* (CUP 2015) 66–71.

⁴⁵ Lyons *et al.* (n. 39) 83.

above, was more focused on their perceived loss of influence than it was on highlighting Third World double standards.

The Third World bloc were in a much stronger position in the Commission than they were in other UN bodies and were able to overcome some of the structural weaknesses outlined in chapter one. This was principally because they were able to mobilise bloc votes to advance their own agenda. After the expansion of the Commission in the late 1960s Boyle noted that bloc voting and the “solidarity” of “regional and political groupings” was determining its agenda.⁴⁶ Given the relative power that the Third World bloc began to acquire it is somewhat paradoxical that anti-imperialism was such a factor. Part of this can be explained by the context of the UN – it was and remains an organisation constructed in a residually imperialist legal framework as discussed in chapter two. Therefore even if control could be established over a particular UN body the overall framework of the organisation still favoured the interests of formerly colonialist states.

(ii) Double Standards and anti-imperialist opposition from the Third World bloc 1965 -1981

“In definitional terms” Laurie Wiseberg argues “a double standard means applying different criteria to situations which are so similar that they merit equal treatment.”⁴⁷ Whilst this may seem truistic, double standards can be a difficult concept to grasp. International human rights law was, as David Forsythe notes, predominantly shaped in a liberal Western mould.⁴⁸ Therefore many instances of double standards can be read as manifestations of different or divergent human rights standards. Double standards were where human rights abuses were criticised by states in the Third World bloc when practiced by formerly colonialist states, but explicitly or implicitly defended when analogous or identical practices occurred in the Third World. For example Wiseberg notes that during the 1960s “no parallel was drawn between the exploitation of the Ethiopian peasant and the exploitation of the South Africa squatter” even though both were exploited by their governments and denied political rights.⁴⁹ Double standards should not be confused with a rejection of the concept of human rights; those practicing double standards often accepted the idea of a system of international human rights

⁴⁶ Boyle (n. 23) 19.

⁴⁷ Laurie Wiseberg ‘Human Rights in Africa: Toward the Definition of the Problem of a Double Standard (1980) 10 A Journal of Opinion 66, 68.

⁴⁸ David Forsythe *Human Rights In International Relations* (2nded. CUP 2006) 34-7.

⁴⁹ Wiseberg (n. 47) 67.

law - they disagreed about whom it ought apply to, arguing that human rights scrutiny should not be applied to states within the Third World bloc.

Double standards were not confined to states in the Third World; in the 1980s the US openly supported authoritarian anti-communist regimes in Latin America whilst claiming to support human rights. Jeane Kirkpatrick, US Ambassador to the UN during the Reagan administration argued that there was a distinction between 'authoritarian' and 'totalitarian' regimes. US support for authoritarian regimes could coexist with their commitment to promote human rights because they were "less repressive" than totalitarian regimes as they left "in place existing allocations of wealth, power [and] status".⁵⁰ Kirkpatrick was relatively clear that the reason for favouring authoritarian regimes, and ignoring their human rights abuses, was that they were "more compatible with US interests".⁵¹ Double standards on human rights protection in international organisations were often manifestations of intra-bloc ideological preferences and resulted in some states or some issues never being considered because they were protected by bloc votes at the Commission that delayed or hampered consideration of human rights abuses in their jurisdiction. This evidently infuriated some UN officials and in a 1982 address to the 38th session of the Commission, the Director of the UN Human Rights Division, Theo van Boven said that he found it "unacceptable...[that] gross violation of human rights in any country should not be discussed ... simply because other situations have not been taken up as well."⁵²

Double standards should not just be seen in terms of states pursuing their own self-interests, as states in the Third World bloc often cited two specific objections to international human rights law to justify their double standards. Firstly it was often argued, as Third World delegates did at the First World Conference on Human Rights in Tehran in 1968, that the UDHR did not meet the material needs of Third World.⁵³ This was a definite case of anti-imperialist ideological opposition as the inadequacy of the UDHR in terms of advancing development was a major part of the Third World bloc's criticism of international human rights law. There was however little explicit linkage drawn between ideological opposition and the practice of double standards. Secondly, it was implicitly and sometimes explicitly, argued that non-apartheid related human rights abuses were of a lesser priority than those committed under apartheid. This argument was rooted in the Third World bloc's collective

⁵⁰ Jeane Kirkpatrick *Dictatorships and double standards: rationalism and reason in politics* (Simon and Schuster 1982) 33.

⁵¹ Ibid.

⁵² Address at 38th session of Commission on Human Rights, Geneva 1 February 1982 in Thomas Franck 'Of Gnats and Camels: Is there a Double Standard at the United Nations?' (1984) 78 AJIL 811, 828.

⁵³ Burke (n 29) 99-106.

identity as the remaining minority rule/colonial regimes in Africa posed an existential threat to their sovereignty as they represented the continuation of colonialism in defiance of international law. Given the relative fragility of many Africa states sovereignty the presence of an imperialist redoubt in Southern Africa, which in the 1960s looked set to continue in spite of international action, posed an existential threat to postcolonial sovereignty in Africa.⁵⁴

When the existence of apartheid was used to inhibit the consideration of the human rights records of states in the Third World bloc but encourage the consideration of other states this was an act of anti-imperialist institutional opposition. The double standards from the Third World bloc were based on the notion that postcolonial sovereignty was unequal and under threat from international law which justified collective anti-imperialist institutional opposition towards the application of international human rights law by international organisations in postcolonial states. As the Commission was a political organisation, its protection mandate depended upon a process of politically shaming a state in order to trigger a process of law reform. The obstruction of what Conall Mallory termed the “name and blame” process of identifying a state as a human rights violator was a way of protecting the domestic-legal sovereignty of a state by preventing it from being subject to a process whereby it was under pressure to change its laws.⁵⁵ Double standards in this regard were also a form of extreme anti-hegemonic ideological opposition, as they were predicated on the implicit belief that all human rights abuses were colonialist in origin.

It is important to note that there was a marked shift from implicit double standards to explicit double standards as the number of Commission members from the Third World bloc increased in 1967. The increase in membership led to there being 14 members from the African and Asian geographic blocs. With the added support of the 12 Latin American and Eastern European bloc this meant that the Third World bloc could count on between 45-75% of the voting power in the Commission. Although this was subject to alliances on specific issues it allowed the Third World bloc to effectively shape different aspects of the Commission’s work. It also allowed them to reinforce their basic position on the application of human rights law. In 1968 in a Commission sponsored debate on polices in the occupied Palestinian territories, the delegate from Iraq was challenged about the executions of prisoners in Iraq. The Iraqi delegate responded that these were wholly domestic matters and other delegates on the Commission

⁵⁴ For this perspective see Larry Bowman ‘The Subordinate State System of Southern Africa’ (1968) 12 International Studies Quarterly 231.

⁵⁵ Conall Mallory ‘Membership and the UN Human Rights Council’ (2013) 2 Canadian Journal of Human Rights 1,18.

supported this position. From the late 1960s onwards Boyle described bloc voting at the Commission as “restricting and frustrating its work”.⁵⁶

Rupert Emerson writing in 1975 observed that systematic human rights abuses, such as massacres in Rwanda in 1965 and forced deportations in Ghana, were being overlooked, ignored or in some cases even defended by the Third World bloc at the Commission.⁵⁷ Delegates from the Third World bloc blocked discussion of discriminatory practices in Ghana and Tanzania by the Sub-Commission.⁵⁸ This did not necessarily mean that the states in the Third World bloc were always successful in blocking the consideration of communications from Third World states. In 1977 the Sub-Commission considered a communication from Jehovah’s Witnesses in Malawi alleging that the government was attempting to ban them from practicing their religion. One possible reason that this communication might not have been subject to the same level of opposition was, as the Commission acknowledged in their report to ECOSOC in 1980, that the abuses complained of had ceased in 1975. Given this the Commission recommended only that ECOSOC call for damages for “those who may have suffered injustices”.⁵⁹ Yet, at the same time the Commission noted the “failure of the Government of Malawi” to co-operate or respond to the communication over a three year period, indicating that standard patterns of institutional opposition were still a feature of Third World bloc states interaction with the Commission.

When Uganda’s forced expulsion of the Asian community came before the Sub-Commission in 1972 consideration of the case the Nigerian delegate to the Commission attempted to bloc it arguing that the situation “was not a human rights abuse”.⁶⁰ A number of Commission delegates argued that they should not concern themselves with matters outside Southern Africa, even though what was going on in Uganda was systemic racial discrimination of the sort that the Sub-Commission had a direct mandate to investigate.⁶¹ In March 1977 the Sub-Commission was forced into abandoning an investigation into systematic human rights abuses, including the operation of government sponsored death squads in Uganda, after political resistance from African members on the Commission.⁶² After a group of Nordic countries in 1978 proposed a General Assembly resolution condemning Uganda, African states from the

⁵⁶ Boyle (n. 23) 19.

⁵⁷ Rupert Emerson ‘The Fate of Human Rights in the Third World’ (1975) 27 World Politics 201.

⁵⁸ Weinstein (n 25) 19.

⁵⁹ ESCOR Supp (No.3) 202 UN Doc E/1980/13.

⁶⁰ Weinstein (n 25) 18.

⁶¹ Ibid

⁶² Richard Ullman ‘Human rights and Economic Power: The United States versus Idi Amin’ (1978) 56 Foreign Affairs 529.

Third World bloc negotiated a compromise where the resolution would not be debated or put to a vote and the situation referred back to the Commission for investigation.⁶³

The Commission first received communications alleging serious human rights abuses in Equatorial Guinea in 1974 and considered the communications in confidence in 1975. Since independence the government of Macías Nguema had engaged in systematic internal repression which included public summary executions and by the mid-1970s Nguema had murdered, for real or imaginary crimes, over two thirds of all of the members of parliament elected in 1968.⁶⁴ The police and the army had beaten to death numerous public officials and notoriously Nguema personally oversaw the decapitation of his finance minister. When the Commission tried to open up a dialogue with Equatorial Guinea this was initially rejected by the Nguema government, who criticised the UN using standard anti-imperialist language, and other members of the Commission initially supported this position. It was not until 1977 when regional bodies joined the condemnation of Equatorial Guinea that the Commission was able to adopt a confidential resolution and in 1978 they were able to launch an investigation under Resolution 1503.⁶⁵ The Nigerian government were particularly keen to take action as many Nigerian guest workers in Equatorial Guinea had been killed in state run executions. When Nguema was overthrown in a coup in 1979, the new government began to co-operate with the Commission, allowing the visit of a Special Rapporteur, although this appears to have been a largely tactical move as the new government obstructed the Special Rapporteur's work at several stages. What is significant about Equatorial Guinea was that it began as a case of double standards but when the scale of the government's human rights abuses threatened the security of neighbouring states, Third World states supported the Commission's actions.⁶⁶ Importantly the Equatorial Guinea case did not create any wider precedent for action from the Commission.

The claim of imperial or colonial bias weakened slightly in the early 1980s and when the Sub-Commission considered a report on slavery in Ethiopia and Mauritania from a group of NGOs, anti-imperialist complaints about the report were simply rejected.⁶⁷ It is noteworthy that one of the reasons for the Commission's relative success in its actions against Chile was due to its government losing its key geopolitical ally when the US under the Carter administration adopted a pro-human rights foreign policy. This led to it falling outside the major power blocs

⁶³ Ibid.

⁶⁴ Randall Fegley 'The UN Human Rights Commission: The Equatorial Guinea Case' (1981) 3 HRQ 34.

⁶⁵ Ibid.

⁶⁶ See Annual Human Rights Reports Submitted to Congress by the U.S. Department of State, (1981) Vol 6.

⁶⁷ Ton Gardeniers et al. 'The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities: Recent Developments' (1982) 4 HRQ 353.

and becoming politically isolated at the UN. The Third World bloc had little sympathy with the Pinochet regime and it was alienated from many other pro-Third World regimes in the Latin American region. Van Boven noted that “Chile like situations” in other parts of Latin America never came before the Commission and the repeated presence of South Africa on the Commission’s agenda meant that by the end of the 1970s “reproaches of selectivity, double standard, conspiracy of silence...” were constantly “in the air” at the Commission’s meeting.⁶⁸

During this period South Africa, Rhodesia, and the remaining Portuguese colonies were perpetrating significant and systemic human rights abuses. However, as Wiseberg notes, this argument cannot logically excuse or explain the Third World bloc’s insistence that apartheid should be the sole concern of international human rights organisations to the active exclusion of other situations.⁶⁹ Double standards may have actually retarded the construction of an anti-apartheid consensus in international organisations as some Western states reacted with hostility to what they saw as an attempt to weaken human rights by some members of the Third World bloc, and this contributed to the relative lack of agreement at the First World Conference on Racism in 1978. Double standards also allowed Western leaders who were wary of any direct legal action against apartheid for domestic political reasons, such as President Ronald Regan and British Prime Minister Margret Thatcher, to justify their inaction, as they claimed that Third World human rights abuses needed to be tackled first because they were not being addressed. This was highly cynical politics but illustrated how double standards among one group of states created an incentive for double standards that cut could across all international organisations. Double standards became more complex in the mid-1980s and as the second section of this chapter outlines, also continued at the Human Rights Council.

(iii) Anti-imperialist opposition and the collapse of the Commission’s protection mandate: 1982 -2005

The appointment of Thematic Special Rapporteurs, beginning in 1982 with the appointment of Special Rapporteur on Arbitrary Detentions, allowed for the investigation of specific issues outside of thematic or specific resolutions at the Commission. The independence of Special Rapporteurs, who had roving briefs that continued outside of the Commissions’ sittings, circumnavigated the power of voting blocs at the Commission.⁷⁰ This was complimented by the work of specialist working groups, in particular the Working Group on Enforced or Involuntary Disappearances which had broad ranging remits and powers which included the

⁶⁸ Theo van Boven, ‘United Nations and Human Rights, A Critical Appraisal’ in Cassese (ed), *UN Law/Fundamental Rights: Two Topics in International Law* (Springer 1979) 127.

⁶⁹ Wiseberg (n. 47).

⁷⁰ Diane Shelton ‘International Enforcement of Human Rights: Effectiveness and Alternatives’ (1985) 79 AJIL 168.

ability to mount country visits. The Third World bloc were initially supportive of the Working Group on Enforced Disappearances in 1981, as it was created in response to the on-going human rights abuses committed by the military regime in Argentina. This support was in part contingent; Argentina was a right-wing authoritarian regime, with pro-US leanings, isolated from pro-Third World Latin American states. When the Commission's final report included references to Ethiopia and other countries this was heavily opposed by some states in the Third World bloc. Opposition took the form of collective non-cooperation with both Special Rapporteurs and Working Groups. In 1989 the Working Group on Enforced or Involuntary Disappearances reported that seven states, including Angola and Guinea, had not substantively replied to numerous allegations of human rights violations in their countries.⁷¹

Susan Koshy argues that during the 1980s bloc based resistance began to soften as changes to the membership of the Commission led to the inclusion of more Western states that formed "issue based coalitions" with members of the Third World bloc on a variety of different matters.⁷² There is some basis to believe Koshy's basic contention on this point as during the 1980s a number of different special rapporteurs and working groups began to be appointed, dealing with torture, arbitrary detention and freedom of religion.⁷³ From 1981 to 1985 the Commission issued a series of resolutions singling out Iran and Kampuchea (Cambodia), two states that had previously been defended by the Third World bloc, for engaging in systemic human rights abuses. Yet the cause of this was not necessarily a change in the Third World bloc's attitude to the Commission's protection mandate but rather a change in the domestic political structures of the states concerned. The Iranian revolution and their war with Iraq had broken down the standard pattern of intra-bloc solidarity. Writing about voting patterns in the General Assembly in the 1980s Tomas Frank observed that the Third World bloc by and large voted in favour of resolutions condemning the Vietnamese invasion of Kampuchea, because this was a reflection of their common consensus on the issue of non-interference in sovereign affairs.⁷⁴

By the end of the 1980s the complaints system, under resolution 1503, had run into problems. The Commission's role as a political gatekeeper to the Sub-Commission meant that the Third World bloc were able to maintain patterns of collective anti-imperialist opposition. The only way to consider some cases, such as the systemic human rights abuses under the Mobutu

⁷¹ Read Broody and David Wissebrodt 'Major Developments at the 1989 Session on the UN Commission on Human Rights' (1989) 11 HRQ 586.

⁷² Susan Koshy 'From Cold War to Trade War: Neocolonialism and Human Rights' (1989) 58 Social Text 1, 9.

⁷³ Suzanne Egan *The UN Human Rights Treaty System: Law and Procedure* (Bloomsbury Professional 2011) 32.

⁷⁴ Franck (n 52).

regime in Zaire, was in confidence under the 1503 procedure and many of these cases were never made public.⁷⁵ This weakened the Commission's protection mandate which was contingent upon identifying a state as a human rights violator.⁷⁶ Some states were able to escape consideration in confidential sessions all together; from 1984 onwards Pakistan was highlighted as cause for concern at Commission meetings but managed to escape referral to the Sub-Commission for action for years. In a particularly grisly coincidence in 1988 the Commission removed Iraq from the investigation procedures under Resolution 1503, just four days before Saddam Hussein's government launched a nerve gas attack on the Kurdish minority in Iraq.⁷⁷ By the beginning of the 1990s however, the relative decline of the voting power of the Third World bloc and a greater promotional interest in human rights among African governments meant that the number of country specific cases considered by the Commission trebled.⁷⁸

It was the further expansion of the Commission in 1992 which contributed to a return of bloc voting. This was accompanied by a renewed sense of solidarity among the Third World bloc against the US, because of their long running campaign at the Commission against Cuba and their foreign policy, which increasingly used humanitarian justifications for what appeared to be neo-imperialist actions.⁷⁹ Cuba was able to rally the Afro-Asian bloc in the late 1990s and early 2000s to openly challenge resolutions on civil and political rights. A similar issue arose with China who after 1992 managed to escape criticism or investigation of its own human rights abuses until the Commission's demise in 2006. It did this by constructing a coalition of states from the Afro-Asian bloc which supported a policy of no further action when the US tabled resolutions criticising China's suppression of political dissent and religious freedom. By 2001 China had escaped censure nine times meaning that the 1989 Tiananmen Square massacre was never considered by the Commission.⁸⁰ When the US was voted off the Commission in 2001 this was seen as a direct attack on their imperialist policies and increasing tendency towards unilateral interpretations of international law.⁸¹ Yet China never received anything like the same treatment even though by the 1990s it was engaging imperialist

⁷⁵ Ibid.

⁷⁶ Reputational politics have been identified as major feature to encourage compliance with varying degrees of legal obligations – see Alex Geisinger and Michael Stein 'Rational Choice, Reputation and Human Rights Treaties' (2008) 106 Michigan Law Review 1129.

⁷⁷ David Wissbrodt 'Country-Related and Thematic Developments at the 1988 Session of the UN Commission on Human Rights' (1988) 10 HRQ 544,550.

⁷⁸ Parker and Wissbrodt 'Major Developments at the UN Commission on Human Rights in 1991' (1991) 13 HRQ 573.

⁷⁹ Koshy (n. 72).

⁸⁰ Recent Developments 'The Fifty Sixth Session of the UN Human Rights Council' (2001) 95 AJIL 213.

⁸¹ Recent Developments 'Loss of U.S. Seat on the UN Human Rights Commission' (2001) 95 AJIL 877.

practices such as using economic leverage on states to encourage them to abstain from critical votes in international organisations. The ideological rationale behind the Afro-Asian bloc in the Commission appeared to be entirely anti-hegemonic rather than anti-colonial – it was focused on attacking states in the Western and Other Regional Group at the UN rather than attacking colonialism as a practice. Afro-Asian bloc states sided with Russia when resolutions on the situation in Chechnya came before the Commission, even though the victims in this case were a Muslim minority living under what was arguably a form of colonial rule. However, Russian support for non-intervention policies in international organisations was invaluable to the anti-imperialist institutional opposition of the Afro-Asian bloc.

There were signs that direct anti-imperialist opposition was in the mid-1990s losing some of its potency; when Sudan attacked the Commission as imperialist and racist for criticising the discriminatory nature of the Sharia laws imposed by the military led government, they did not receive any support from other states and a Commission resolution condemning Sudan was adopted by a wide margin.⁸² However Sudan was still voted onto the Commission by the Africa bloc and when the US lost its seat in 2001, it was noted by some observers that it was extremely ironic that Sudan was able to keep its seat even though it was engaging in slavery and racial and religious oppression.⁸³ Afro-Asian bloc states also continually supported resolutions against Israel, which by the late 1990s had become increasingly open ended. Many of them focused on attacking Israel politically rather than on specific abuses experienced by Palestinian civilians. The reason for these shifting alliances was due both to the nature of individual governments and the increasing ideological fragmentation of bloc voting.

A subtler form anti-imperialist institutional opposition occurred through attempts to engineer double standards within the Commission's legal powers. In 1993 states from the Western and Other bloc were able to successfully resist a proposal by the Third World bloc to limit the mandate of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to only examining cases in Europe and North America.⁸⁴ In 2001 the Asian bloc opposed the work of a Commission subgroup examining a declaration of indigenous rights, arguing that it should not include indigenous communities living in their states. They argued that the concept of indigenous people only concerned the "situation of

⁸² John Crook 'The Fiftieth Session of the UN Commission on Human Rights' (1994) 88 AJIL 806.

⁸³ The US was furious at this development and creating a lasting sense of hostility from the US to both the Commission and later the Council see Luisa Blanchfield 'The United Nations Human Rights Council: Issues for Congress' Congressional Research Service, Research Paper no. 7-5700 30 April 2013.

⁸⁴ Beate Rudolf 'The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights' (2000) Max Planck UNYB 289, 319.

the original inhabitants ... disposed and marginalised by settlers from overseas [that] still remain under domination”.⁸⁵ This would have confined indigenous rights to the Americas and Oceania (the Australian Pacific region) and the reference to domination was a way of inferring colonial-imperialism.

The major focus of ideological opposition from Afro-Asian bloc states in the late 1990s and early 2000s, was the promotion of democracy as a human right and an integral component to the rule of law. In 2001 several states from the Afro-Asian bloc, including the Democratic Republic of the Congo, Libya, Swaziland, Syria, and Vietnam abstained on a motion about importance of free and fair elections but supported a motion, sponsored by Cuba, emphasising the need to tackle socio-economic inequality as part of democratic governance. As the Indian delegate noted the Cuban resolution highlighted “the fact that poverty inhibits the full and effective enjoyment of human rights” and this appeared to be a continuation of the Third World bloc’s attempts to reprioritise human rights.⁸⁶ However, when competing resolutions on democracy were again tabled in 2002 Michael Dennis noted that some states in the Afro-Asian bloc were supporting competing resolutions “with the intention of subverting efforts to promote and define democracy, and not with the intention of promoting economic, social, and cultural rights... within their own countries”.⁸⁷ At the 60th Session of the Commission in 2004 there were a large number of resolutions on the promotion of economic social and cultural rights but as Nazila Ghanea and Ladan Rahmani noted there was little progress on the issue of creating an enforcement mechanism for these rights.⁸⁸ This anti-hegemonic ideological opposition from the Afro-Asian bloc was illustrative of a general antipathy towards the protection of human rights with resolutions on economic and social rights being used to subvert the development of supranational rights protection more generally rather than strengthen the protection of economic and social rights. As the previous chapter detailed this had been a feature of anti-imperialist ideological opposition from the Third World bloc since the First World Conference on Human Rights in 1968.

Double standards, both Third World double standards and other political double standards, had by the early 2000s become increasingly problematic and were undermining the efficacy of the Commission. Louise Arbour, UN High Commissioner, in a 2005 speech described it as

⁸⁵ Recent Developments ‘The Fifty-Seventh Session of the UN Commission on Human Rights’ (2002) 96AJIL 181,186.

⁸⁶ Ibid.

⁸⁷ Michael Dennis ‘Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council’ (2003) 97 AJIL 364, 366.

⁸⁸ Nazila Ghanea and Ladan Rahmani ‘A Review of the 60th Session of the Commission on Human Rights’ (2005) 9 IJHR 125.

“wrong and obscure” that states were able to view blocking moves as “a political triumph”.⁸⁹ She went on to say that “violation[s] of human rights and fundamental freedoms in any part of the world” were being answered with reference to resolutions only targeted against four states.⁹⁰ An empirical analysis of Commission membership in 2008 by Martin Edwards *et al.*, revealed that states with comparatively worse human rights records were more likely to be elected to the Commission.⁹¹ The data presented analysed a country’s comparative score on an index of physical integrity violations that measured incidents of unlawful killings, political arrests and other human rights violations and showed a correlation between the propensity of a state to commit human rights abuses and their seeking Commission membership. This became particularly apparent after 2000 and coincided with an acceleration of double standards in terms of votes and decisions about investigations of human rights abuses.⁹² In 2003 when Libya was appointed as chair of the Commission, whilst maintaining a network of torture facilities for opponents of its government, it provoked a significant international backlash.⁹³ In July that year the incoming High Commissioner for Human Rights Sergio Vieira de Mello warned that the Commission’s “use for political ends” was giving rise to a “very serious credibility problem.”⁹⁴

(iv) Interpreting anti-imperialist opposition at the Commission

“Imagine a jury that includes murderers and rapists” Brad Roth the Executive Director of Human Rights Watch wrote in a New York Times opinion piece, noting that such “spectacles are not far from reality at the United Nations Commission on Human Rights”.⁹⁵ These very public sentiments illustrated just how far the credibility of the Commission had been eroded by the escalation of double standards in the 1990s. A report from the UN Secretary General’s office in 2005 noted that as some states used membership of the Commission to attack other states, the Commission had developed a “credibility deficit”.⁹⁶ Ideological and institutional anti-imperialist opposition was heavily responsible for generating this credibility deficit. It is

⁸⁹ Ghanea ‘From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways’ (2006) 55 ICLQ 695, 697.

⁹⁰ Ibid.

⁹¹ Martin Edwards *et al.* ‘Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission’ (2008) 61 Political Research Quarterly 390.

⁹² Steve Sachs ‘Sins of Commission: Repressive Regimes and the U.N. Commission on Human Rights’ (2003) available at http://www.stevesachs.com/papers/paper_hrc.html accessed 9 July 2015.

⁹³ Jean-Claude Buhrer ‘UN Commission on Human Rights Loses All Credibility: Wheeling and dealing, incompetence and “non-action” Reporters Without Borders July 2003 available at http://www.rsf.org/IMG/pdf/Report_UNU_gb.pdf accessed 9 July 2015.

⁹⁴ Ibid .3.

⁹⁵ Kevin Roth ‘Despots Pretending to Spot and Shame Despots’ *New York Times* 17 April 2001 available at http://www.nytimes.com/2001/04/17/opinion/17iht-edroth_ed2.html accessed 9 July 2015.

⁹⁶ GA/59/2005 ‘In larger freedom: towards development, security and human rights for all’ 21 March 2005

important in any historical assessment of the Commission to stress that the Third World bloc were not wholly responsible for the Commission's collapse and long term hostility from the US also played a role in the decline of its credibility.

As noted above the double standards of the Third World bloc were a mixture of anti-imperialist institutional opposition and anti-hegemonic opposition. A partial defence of double standards could be mounted by looking at the fallacies of the universal human rights project. Universality is contingent upon the idea that a depoliticised interpretation of rights exists that applies to every person equally. As argued in the previous chapter this is ahistorical and ignores the socially contingent nature of many rights, which often places a large premium upon rights, such as civil rights against the state, that are highly Western centric in both their origin and importance. This argument explains why different conceptions of human rights exist and why states adopt a relativistic position. There is however, little evidence that relativism, of the sort outlined in the previous chapter, was a factor in anti-imperialist opposition at the Commission. Additionally the practice of double standards involves accepting the principle of universal rights, whilst in practice cherry picking the incidents that could be considered human rights abuses by a human rights organisation. Protecting some states over others undermined the Commission's protection mandate which was entirely dependent upon what Ramcharan described as the bringing of the "international presence to bear upon a situation".⁹⁷ Political shaming, as the final chapter makes clear, was the principal way for protection mandates to encourage compliance, with international human rights law.

One of the closest attempts at an ideological justification for Third World double standards was made by Ali Mazuri who argued that African nationalism aimed to seek "pigmentational self-determination" to rectify the core problem with colonialism which was domination by other races.⁹⁸ Although Mazuri's argument was focused on self-determination, the basic principle was that human rights and self-determination were remedial anti-colonial concepts, which did not apply to postcolonial states. This, as Onyeonoro Kamanu notes, implicitly defended intra-racial domination and was essentially the position which the Third World bloc often by default endorsed when arguing that human rights standards should not apply to postcolonial states.⁹⁹ At its best this was a case for alternate forms of imperial domination and, at its worse, can be read as an argument that denies the citizens of postcolonial states

⁹⁷ Ramcharan, *The Concept and Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration*, (Kulwer Academic Publishers 1989) 138.

⁹⁸ Ali Mazuri *Towards a Pax Africana: A study of Ideology and ambition* (Chicago 1967)14.

⁹⁹ Onyeonoro Kamanu 'Secession and the Right of Self-Determination: An OAU Dilemma' (1974) 12 *The Journal of Modern African Studies* 355.

agency as their oppression and genuine campaigns against their governments could be ignored because of the racial identity of those committing the human rights violations. Frequently the implied and expressed justification used for applying double standards was the historical fact of colonialism and that it was therefore more important to address was the manifest injustices in the system of colonial rule. Yet that was not what anti-imperialist opposition at the Commission, was doing. The practice of double standards shielded the governments of postcolonial states who were engaged in repressive actions against their citizens. Again it is important to stress that the Third World bloc were not alone in double standards. After the Helsinki Accords of 1977, which made the language of human rights part of the ideological battleground of the Cold War, both the US and the USSR engaged in repeated double standards on Human Rights issues, which contributed to the erosion of the Commission.¹⁰⁰ These states were neo-imperial superpowers that used the human rights situation in weaker states as pawns in an ideological rivalry, whereas Third World states were often some of the weakest states in the UN. Nevertheless the direction of anti-imperialist opposition within the Commission seemed more preoccupied with attempting to shield states in the Third World bloc from the exercise of its protection mandate

What is remarkable is that the activities of the Third World bloc at the Commission focused relatively little on attempts to reprioritise the content of international human rights law. The campaign to launch a New International Economic Order, which was at its zenith in the General Assembly in the mid-1970s received little attention in the Commission. Prior to the drafting of the declaration of the Right to Development at the Commission, economic and social rights took around 5% or less of the Commissions time. It was only after 1980 that economic and social rights began to take over 10% of the Commissions time.¹⁰¹ This could reflect Brownlie's general statement, outlined in the last Chapter, that it was only in the 1980s that the language of rights became dominant in campaigns for distributive justice.¹⁰² However, since the First World Conference on Human Rights, the Third World bloc had consistently identified the material inadequacy of human rights as the key problem with human rights law. In the 1990s economic and social rights were still the focus of only around 10% of the Commission's time. When considering this, alongside the role that relativism played in anti-imperialist opposition at the Commission, it is reasonable to conclude that anti-imperialist

¹⁰⁰ Forsyth (n 48) 40-45.

¹⁰¹ For details of this data see Donnelly (n 26).

¹⁰² Ian Brownlie *The Human Right to Development* (1989) opp cite Uvin 'From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development' (2007) 17 *Development in Practice* 597,598.

ideological opposition was not focused on reforming the imperialist context of existing international human rights law.

Significantly the thread that connected these incidents of anti-imperialist opposition together, particularly those detailed in the third part of this section, was the protection of postcolonial states sovereignty from international organisations. Many of the incidents of anti-imperialist institutional opposition, such as the blocking of states being scrutinised by the Sub-Commission, and the fight over the concept of democracy, were aimed at reducing the capacity of the Commission to exercise its protection mandate over postcolonial states. As demonstrated in the next section anti-imperialist opposition at the Council, which replaced the Commission in 2006, was also concerned with protecting states from the exercise of the organisation's protection mandate.

(2) Anti-imperialist opposition at the UN Human Rights Council: 2006 onwards

In 2006 the UN Secretary General Kofi Annan warned that the Commission had “a credibility deficit” which “casts a shadow on the reputation of the United Nations [human rights] system as a whole.”¹⁰³ In December 2004 the High-level Panel on Threats, Challenges and Change which was empowered to evaluate existing UN institutions and their capacity to provide security in the Twenty First Century published their findings.¹⁰⁴ Their report criticised the Commission's “double standards” and noted its diminishing credibility.¹⁰⁵ They concluded that too many states were seeking membership of the Commission “not to strengthen human rights but to protect themselves against criticism or to criticize others.”¹⁰⁶ In 2005 Annan's office published a report entitled ‘In Larger Freedom’ on UN reform which noted that the Commission's double standards had cast “a shadow on the reputation of the United Nations system as a whole” and recommended the creation of a new Human Rights Council.¹⁰⁷ By 2006 there was an emerging consensus at the UN that the Commission was not fit for purpose when it came to protecting human rights. One clear theme emerging from both reports was that the new body should have some form of membership criteria to prevent states that routinely abused human rights from using their membership of the Commission to give their actions greater legitimacy. Annan was clear that he wanted “those elected to the Council ...to

¹⁰³ Kofi Annan as quoted in Helen Upton ‘The Human Rights Council: First Impressions and Future Challenges’ (2007) 7 HRLR 29, 29.

¹⁰⁴ GA Rep 59/565, High-level Panel on Threats, Challenges and Change addressed the Secretary-General, 2 Dec 2004, para 3.

¹⁰⁵ Ibid. 283

¹⁰⁶ Ibid.

¹⁰⁷ GA/59/2005 (n 96) para 182.

abide by the highest human rights standards" to eliminate the practice of human rights abusing states protecting and defending one another from scrutiny.¹⁰⁸

Around this time there were a variety of proposals for institutional reform in circulation. After a series of highly critical reports on UN Treaty Bodies by Phillip Alston, a school of thought emerged that a single unified treaty body was the way to rectify institutional weaknesses and at conferences in Lichtenstein in 2003 and Nottingham in 2006 various proposals for a unified treaty body and harmonised reporting process were considered by groups of experts.¹⁰⁹ In a 2006 concept paper Louise Arbour, the UN High Commissioner on Human Rights, argued that a unified standing treaty body would create an authoritative and visible system for protecting human rights.¹¹⁰ Manfred Nowak took these arguments still further arguing for the creation of a world human rights court modelled on the European Court of Human Rights (ECHR) which would act as a tribunal of last resort for human rights complaints against states.¹¹¹ Nowak argued that this new court would not require a new treaty but states could indicate the existing treaties which "the Court may apply in cases brought against them" and the court could then offer reparations to the victims of human rights abuses.¹¹² In a 2011 article, after the Council had commenced its operations, Nowak argued that a world court human rights court would face less opposition than the Council.¹¹³ Nowak offered little conclusive analysis to indicate why this would be possible, let alone probable and much of his argument appears to focus on a scaling up of the ECHR on a transnational scale.

Alston noted that whilst there was some disagreement between the different views about the powers of the new Council and what functions it should perform the general consensus was that a new body should be representative but not adopt the partisan approach to human rights protection that had been prevalent in the Commission.¹¹⁴ However, as Alston noted, there was a general failure of agreement about what had gone wrong with the Commission.

¹⁰⁸ Ibid.

¹⁰⁹ Michael O'Flaherty 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' from G Gilbert, (eds.) *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge, 2011) 68-84. See also Phillip Alston 'Final Report on Enhancing the Long- Term Effectiveness of the United Nations Treaty System' UN Doc E/CN 4/1997/74 27 March 1997.

¹¹⁰ Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' UN Doc HRI/MC/2006/2.

¹¹¹ Manfred Nowak 'The need for a World Court of Human Rights' (2007) 7 HRLR 251.

¹¹² Ibid. 255.

¹¹³ Manfred Nowak 'It's time for a World Court on Human Rights' from (eds) Cherif Bassiouni and William Schabas *New Challenges for the UN Human Rights Machinery: What future for the UN Treaty Body System and the Human Rights Council Procedures* (Intersentia, 2011).

¹¹⁴ Phillip Alston 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 Melbourne Journal of International Law 186.

For example Ghana notes that the 2005 report from the Secretary General's office left a series of unanswered questions about the problems affecting the Commission. Ghana also argued that the politicisation of Commission as well as making it a liability also made it an asset, as it was reactive to its member states.¹¹⁵ Others however disagreed with this assessment and Tomas Wiess was highly critical of what he saw as "state sovereignty and cultural solidarity" routinely trumping efforts to protect rights.¹¹⁶ Whilst both Wiess and Ghana agreed that politicisation was the problem, they were not in agreement about the solution or source of politicisation. This is illustrative of some of the disagreements over the causes of the Commission's decline and the absence of a series of even notionally agreed explanations of its failure meant that the process of shaping the Council took place in a vacuum. One area where this was the case were the proposals for Council membership criteria. As Walter Kälin and Cecilia Jimenez recommended in relation to reform of the Commission's membership, the criteria for membership should be "positively" shaped to encourage membership from states who were complying with reporting requirements in treaty bodies and who complied with other UN bodies.¹¹⁷ This was a shrewd recommendation as rather than set up membership requirements based on the content of a state's domestic laws, which would inevitably aggravate anti-imperialist ideological opposition, these criteria tracked general organisational compliance. However when the High Level Panel on reform – a group of experts appointed by the UN Secretary-General – considered the issue they rejected the idea of a restrictive membership criteria. Their report only noted in general terms that membership criteria could "risk further politicizing" the Council and recommended universal membership without any further consideration of the matter.¹¹⁸

In its first resolution the Council created new mechanisms to enable human rights protection. The Advisory Committee of the Council was a body of 18 experts serving in their personal capacity which was intended to function as the Council's think-tank and provide research on implementation issues relating to the Council's mandate. The Council's individual complaints mechanism was based on the Commission's 1503 procedure and working groups were also set up to investigate thematic human rights issues. Some of the literature on the Council focuses on the UPR to the exclusion of other aspects of the Council – Elvira Redondo described the

¹¹⁵ Ghana (n. 88)702.

¹¹⁶ Tomas Wiess *What's Wrong with the United Nations and How to Fix it* (2nd ed Polity Press 2012) 40.

¹¹⁷ Walter Kälin and Cecilia Jimenez 'Reform of the UN Commission on Human Rights' Institute of Public Law, University of Bern Switzerland 30 Aug 2003 available at <http://www.humanrights.ch/upload/pdf/041201_kaelin_HRC_study.pdf> accessed 9 July 2015.

¹¹⁸ GA Rep 59/565 (n. 105) para 285.

UPR as the “only substantial change introduced” by the Council.¹¹⁹ This is unfair as there were numerous reforms that were highly significant and in many ways it is a different entity to the Commission. The first part of this section examines how institutional opposition emerged in the UPR process and the second part of this section examines anti-imperialist opposition more generally in the Council, specifically referring to some of the changes between the Commission and the Council.

(i) *The Universal Periodic Review (UPR) process*

The UPR process was envisaged in General Assembly Resolution 60/251 which called for a process of human rights review “based on objective and reliable information” where “universality of coverage and equal treatment with respect to all States” would be ensured.¹²⁰ The appeal of the UPR process was that it would not directly target states nor would it be open to control by dominant states – each state would have its turn to attack other states and promote their values and would also have their turn to have their human rights records scrutinised. The process required all UN members to appear every four years before their fellow states at the Council’s headquarters in Geneva. Around 16 countries are reviewed in each UPR session and 48 countries a year go through the review process. Three states are selected at random to comprise a troika which reviews information from the state under review pertaining to their protection of human rights. This includes a country report from the state party, documents from other international human rights organisations (such as treaty review bodies) and reports from civil society organisations and Non- Governmental Organisations about the human rights situation in the country under review.

The centre piece of the process is the dialogic component of the review where the state under review is questioned for up to three and a half hours by the UPR working group which consists of Council members and is chaired by the President of the Council. This takes the process of interactive questioning between the state under review and the rest of the working group, as well as other UN member states, and is part of the UPR’s dialogic approach which attempts to achieve compliance with human rights law through a targeted dialogue with the state under review.¹²¹ After this recommendations are issued from the panel to the state party about changes that have to be made to their laws, domestic policies or state practices. There are five categories of urgency surrounding recommendations and states can reject or accept the

¹¹⁹ Elvira Redondo ‘The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session’ (2008) 7 Chinese Journal of International Law 721.

¹²⁰ A/Res 60/251 3 April 2006.

¹²¹ Upton (n. 101) 34.

recommendations, made and their responses to recommendations are noted. There is a further option to give a general or a specific response to the recommendations and an option to give a general response about how the state views the subject matter of the recommendation being made to it. Recommendations give the UPR process a protection mandate, as statements are issued about what the laws of a state ought to be, although the process as a whole is not judicial in the sense that the UPR is not a tribunal and there is no forum for individual petition. Its protection mandate is principally political in that it aims to use the dialogic process to encourage compliance with international human rights law.

UN Secretary General Ban Ki Moon said that peer review would send a “clear message that *all* countries would have their human rights record and performance examined.”¹²² The equality of arms between states was constructed in juridical terms by the rules governing the conduct of UPR proceedings. It allows states to essentially drive proceedings and dictate what priorities they perceive as important by asking questions to the state under review. States under review can also advance their own human rights priorities, which would on the face of it address some of the concerns inherent within anti-imperialist ideological opposition outlined in the previous chapter. For example Malaysia was able to emphasise at length the importance of economic and social rights when it was under review.¹²³ At the opening of the 26th session of the Council the delegate from Cuba praised the UPR process for creating real “equality between states” which, given Cuba’s opposition to the Commission detailed above, indicated that on this measure the UPR had been notionally successful in addressing a specific grievance from the Third World bloc.¹²⁴ Equality between states however, requires that some obvious double standards from certain states are ignored. There was a public outcry when in the spring of 2014 the Saudi Arabian delegate criticised Norway, the state under review at the time, for its allegedly poor record of protecting women’s rights.¹²⁵ In the name of equality it was also necessary for the UPR process to abandon any criteria for participation based on a state’s human rights of record to maintain the appearance of parity between states.

The UPR, whilst dependent on a juridical fiction of equality, was able to bypass much of the residual imperialism in conventional international legal structures by levelling down the

¹²² Emphasis mine - Address to the seventh ordinary session of the Human Rights Council, 3 March 2008 available at: http://www.un.org/apps/news/infocus/speeches/search_full.asp?statID%196 accessed 9 July 2015.

¹²³ Ying Hooi Khoo ‘Malaysia’s Human Rights Performance: Assessment of its First Session of Universal Periodic Review in the United Nations Human Rights Council’ (2014) 6 *Cosmopolitan Civil Societies Journal* 19.

¹²⁴ 26th Regular Session of the Human Rights Council (10 - 27 June 2014).

¹²⁵ Felicity Morse ‘Saudi Arabia criticises Norway over human rights record’ *The Independent* 29 April 2014 available at <<http://www.independent.co.uk/news/saudi-arabia-criticises-norway-over-human-rights-record-9301796.html>> accessed 9 July 2015.

capacity of Western states to avoid scrutiny of their own human rights records. When the US was under review in November 2010, Ghana, along with several other states, recommended that the US become signatories to the ICESCR, something that as the previous chapter detailed had been the subject of fierce ideological opposition from the US. The US rejected these recommendations along with other more politicised recommendations from Iran, to “refrain from the application of unilateral measures against other countries”.¹²⁶ The US had made an equally politically charged recommendation to Iran when it was under review in February 2010 when it recommended that Iran “discontinue ...show trials”.¹²⁷ This had little to do with the technical implementation of international human rights law, as both states framed their recommendations in politically incendiary language. This was not an indication of the failure of the UPR process but rather a reflection of it at work as it was designed to operate as a forum that could simultaneously ensure scrutiny of the standards set out in international human rights law whilst acknowledging vast ideological disagreements between states on the substance of human rights.

By October 2011, all 193 member states in the UN had been through the UPR process. Navi Pillay, the then UN High Commissioner for Human Rights, said in a press release that the UPR had proved to be a “innovative, transparent, collaborative ...catalyst for change” but cautioned that the process of issuing recommendations needed to become precise and states needed to work with the Council in implementing the accepted recommendations.¹²⁸ In 2011, the Council adopted decisions on the implementation of recommendations requiring the UPR process during the second cycle of country reviews to focus on ensuring that recommendations made during the first cycle of reviews had been implemented, by asking the state under review about domestic law reforms and accession to international treaties.¹²⁹ This strengthened the UPR’s protection mandate as by questioning a state about previous recommendations that had been made to them the UPR process was in effect holding a state to account over its human rights commitments.

Significantly states from the former Third World bloc were still engaged in patterns of opposition, in spite of the notional equality of arms between states in the UPR process. An

¹²⁶ Report of the Working Group on the Universal Periodic Review: United States of America A/HRC/16/11 January 2011 para 92(57).

¹²⁷ Report of the Working Group on the Universal Periodic Review: Islamic Republic of Iran A/HRC/14/12 15 March 2010 para 92(31).

¹²⁸ Press release ‘Pillay hails completion of first-ever human rights review of all 193 states’ Office of the High Commissioner for Human Rights, 13 October 2011 available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11488&LangID=E>> accessed 9 July 2015.

¹²⁹ HRC/RES/16/2112 April 2011 and HRC/DEC/17/119 19 July 2011.

analysis of the first cycle of reviews, beginning in 2008, showed several examples of anti-imperialist opposition. Jarvis Matiya observed that states tended to use official or unofficial groupings to act as a bloc to influence agendas, delegates speaking orders and other procedural matters to protect themselves from scrutiny.¹³⁰ Other studies of the UPR noted that states from the African and Asian bloc would frequently defend other states from their region or would attempt to use their status as developing countries to deflect scrutiny from Western delegates.¹³¹ Tunisia and Bahrain for example were able to mount, what Gareth Sweeny described as, “an exercise in filibustering” by only receiving questions praising their human rights records, when both countries were engaged in violent repression of their domestic political opponents.¹³² In 2011 Pillay warned states not to engage in “manipulative tactics” during the review process and warned that some states “aimed” to turn it “into a meaningless procedural exercise”.¹³³

Recommendations have often not been offered by states in the Afro-Asian bloc to fellow states from the grouping. Where recommendations have been offered they have often been in the form of “friendly recommendations” that have called for technical assistance or capacity building and not directly addressed legislative or administrative barriers to the implementation of human rights.¹³⁴ At Pakistan’s review in 2012 many states from the Afro-Asian bloc framed their statements and recommendations in a manner which reflected previous patterns of anti-imperialist opposition - praising Pakistan’s commitments to socio-economic rights but ignoring numerous failures of the rule of law in the country.¹³⁵ At both Indonesia’s first and second review it received what one account described as numerous “loaded questions from its friends” and many of the recommendations made to the state by the Asian bloc were congratulatory rather than relating to specific reforms.¹³⁶ Whilst activity of this sort may seem fairly inconsequential, in the context of the limited time of the UPR

¹³⁰ Jarvis Matiya ‘Repositioning the international human rights protection system: the UN Human Rights Council’ (2010) 36 Commonwealth Law Bulletin 313.

¹³¹ Gareth Sweeny and Yuri Saito ‘An NGO Assessment of the New Mechanisms of the UN Human Rights Council’ (2009) 9 HRLR 203.

¹³² Ibid 210.

¹³³ Office of the High Commissioner (n 125).

¹³⁴ Allehone Abebe ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’ (2009) 9 HRLR 1, 18.

¹³⁵ UN Watch ‘U.N. Review Praises Pakistan’s Rights Record’ 2 Nov 2012 <<http://blog.unwatch.org/index.php/2012/11/02/pakistan-receives-criticism-and-praise-at-the-un-this-week/>> accessed 10 June 2015.

¹³⁶ Yuyun Wahyuningrum ‘Indonesia and the Universal Periodic Review: Negotiating Rights’ from Hillary Charlesworth and Emma Larking *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014).

sessions, a concerted exercise to swamp the dialogic process with platitudes has the effect of impeding states from other blocs from asking questions.¹³⁷

As Roger Blackburn noted in a 2011 study, many states from the Asian bloc, which had been behind the 1993 Bangkok Declaration used the language contained in it to justify human rights violating practices in their own domestic political systems.¹³⁸ Article 5 of the Declaration stated that human rights needed to be applied with “respect for national sovereignty” and governed by the principle of “non-interference in the internal affairs” of states.¹³⁹ As argued in the previous chapter this effectively neutered supranational human rights scrutiny and protection by providing an unlimited scope for domestic restrictions of human rights law and when the Declaration was raised during the UPR process it was used to resist recommendations for reform before they had even been made. The format of the Peer Review also facilitated relativistic opposition to issues relating to the protection of Lesbian, Gay and Transsexual Rights (LGBT) rights within international human rights treaties. For example in 2009 the Nigerian delegate stated that no homosexuals were visible in Nigeria and used this as a justification for not fulfilling their obligations under the ICCPR to decriminalise laws criminalising sexual orientation.¹⁴⁰ The Gambia resisted recommendations from the UN Human Rights Council to embark on a process of decriminalisation, claiming that Gambian culture would not “allow homosexuality.”¹⁴¹ Some states, such as Malaysia, when under review accepted the majority of recommendations made to it on a subject such as women’s rights, but many of these were framed in open ended terms or, as was the case with China’s recommendation to Malaysia included the language of the Bangkok Declaration saying that such rights should be recognised in “accordance with national circumstances”.¹⁴² Recommendations from Canada and Norway that reservations to the Convention on the

¹³⁷ Maximilian Spohr ‘United Nations Human Rights Council: Between Institution-Building Phase and Review of Status’ (2010) 14 UN Yearbook of International Law 169,202-3.

¹³⁸ Roger Blackburn ‘Cultural Relativism in the Universal Periodic Review of the Human Rights Council’ ICIP Working Papers 2011/03 at <http://www.upr-info.org/IMG/pdf/blackburn_upr_cultural_relativism.09.2011.pdf> accessed 10 June 2015.

¹³⁹ Report of the Regional Meeting for Asia of the World Conference on Human Rights 7 April 1993 A/CONF.157/ASRM/8.

¹⁴⁰ Following the decision on the Human Rights Committee in *Toonen v Australia* (1994) the criminalisation of sexual orientation is incompatible with a state party’s obligation under Article 17 (privacy) and Article 26 (Equality before the Law). Nigeria ‘NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15 (A) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1’ Human Rights Council A/HRC/WG.6/4/NGA/1 5 January 2009 para. 76 accessible at <http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/A_HRC_WG6_4_NGA_1_E.pdf> accessed 16 July 2015.

¹⁴¹ ‘Report of the Working Group on the Universal Periodic Review – Gambia,’ 24 March 2010, UN General Assembly, Human Rights Council A/HRC/14/6, Para. 36 accessible at: <http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/GM/A_HRC_14_6_Gambia.pdf> accessed 16 July 2015.

¹⁴² UPR Info ‘Responses to Recommendations & Voluntary Pledges: Malaysia’ 2014 available at <http://www.upr-info.org/sites/default/files/document/malaysia/session_17_-_october_2013/recommendations_and_pledges_malaysia_2014.pdf> accessed 16 July 2015.

Elimination of All Discrimination Against Women (CEDAW) should be removed were simply noted. This is significant as the presence of wide ranging reservations has long inhibited the operation of the CEDAW Committee.¹⁴³ What unified all of these incidents of defensive relativism was that they were aimed at preventing further scrutiny of the state's human rights record through the UPR process, not at reprioritising the content of international human rights law.

As Elvira Redondo argues, criticism that the UPR process is weak the point because the purpose of the process is to provide a mechanism that is non-confrontational with a more cooperative framework, essentially maintaining that the diluted protection mandate serves an overall normative purpose.¹⁴⁴ As Kälin notes the UPR process is a form of secularised ritual that is dependent upon bringing peer pressure upon states to change their practices and laws.¹⁴⁵ Therefore attempts to inhibit the ritualised nature of the UPR's dialogic process are an act of institutional opposition as it undermines the UPR's protection mandate. The anti-colonial dynamics described earlier in this chapter persisted in different forms in the opposition of postcolonial states to the UPR's protection mandate.

(ii) *Blocs and anti-imperialist opposition at the Council*

The Council consists of 47 member states elected from the UN General Assembly from each of the core regional groupings, in a secret ballot, for a term of three years and states can only serve a maximum of two consecutive terms. The protection mandate of the Council allows it to issue recommendations, which can be used to both highlight human rights violations and encourage positive practices within states.¹⁴⁶ Although states applying for Council membership are notionally under an obligation to "uphold the highest standards" of human rights protection and cooperate with the Council in enforcing these obligations, Yvonne Terlingen argues, that this requirement has not taken seriously by some of its members.¹⁴⁷ In practice membership of the organisation has become something that states are entitled to seek as a matter of status, regardless of their record promoting human rights. The African and Asian blocs in the UN have between them 26 Council seats whereas the Western European and

¹⁴³ See Belinda Clark 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 AHIL 281.

¹⁴⁴ Elvira Redondo 'The Universal Periodic Review – is there life beyond Naming and Shaming in Human Rights Implementation?' (2014) 4 NZ Law Review 673.

¹⁴⁵ Walter Kälin 'Ritual and ritualism at the Universal Periodic Review: A preliminary appraisal' in Charlesworth and Larking (n.136).

¹⁴⁶ Kälin, et al 'The Human Rights Council and Country Situations: Framework, challenges and models', Study on Behalf of the Swiss Ministry of Foreign Affairs, (Institute of Public Law, University of Bern, 2006).

¹⁴⁷ Yvonne Terlingen 'The Human Rights Council: A New Era in UN Human Rights Work?' (2007) 21 Ethics and International Affairs 167, 171.

Other Group and the Eastern European Group have 13 seats. The voting power in the Council, much like the Commission, lies predominantly with postcolonial states. Yet the perpetuation of anti-imperialist of institutional opposition in the Council can be seen as evidence that the driving features of anti-imperialist opposition to human rights organisations more generally lie beyond the asymmetrical sovereignty of postcolonial and formerly colonialist states and the general imperialist context of international law.

As Nowak noted in a study of the first five years of the Council's operation, Algeria and Egypt had emerged as highly dominant players, despite their poor domestic human rights records, and had used their position as states that straddled the Africa bloc and the Organisation of the Islamic Council (OIC) bloc to "pursue their own political interests."¹⁴⁸ Half of all resolutions were focused on Israel and the Occupied Territories which led to other human rights crises being under considered by the Council or ignored all together.¹⁴⁹ A statistical analysis of voting patterns in the first four years of the Council's operation revealed that the majority of resolutions passed without any opposition, although 71 resolutions could be identified as facing significant opposition.¹⁵⁰ Within this selection of resolutions, in particular the ones initiated by Pakistan and Egypt, there tended to be a counter-reaction from European Union states.¹⁵¹ The resolutions that drew the most hostility were resolutions that were in essence country specific, either targeting Israel or a member of the Afro-Asian bloc. However, as Mallory notes, there were a number of states from the Afro-Asian bloc in the Council that were willing to break with the consensus and vote in favour of resolutions directed at other states from that grouping - far more so than in the Commission.¹⁵²

The Council has held far more special sessions to address individual country situations than the Commission and in its relatively short life span has already hosted four times the number of sessions. Israel has been the focus of 30% of all special sessions held to date, and the situations in Darfur, the Democratic republic of Congo and Libya have been the focus of around 12% of all sessions held.¹⁵³ Again the question is one of focus; Israel's human rights abuses require investigation but the level of resources and time given to them, in comparison to the human rights abuses taking place in Sudan, is indicative of anti-imperialist opposition in

¹⁴⁸ Nowak (n. 111) 24.

¹⁴⁹ *Ibid.*

¹⁵⁰ Simon Hugyand and Richard Lukacs 'Preferences or blocks? Voting in the United Nations Human Rights Council' 4th Conference on The Political Economy of International Organizations Jan 2011 available at <<http://www.unige.ch/ses/spo/static/simonhug/pob/pob.pdf>> accessed 15 July 2015.

¹⁵¹ *Ibid.*

¹⁵² Mallory (n.54).

¹⁵³ Freedman (n 28) 64-5.

either an extreme form of institutional opposition or anti-hegemonic opposition. Resolutions from the 2009 special session on Sri Lanka did not condemn the actions of the army, when it was widely documented that it was engaged in crimes against humanity, or call for the creation of an international mechanism to investigate human rights violations. This was because the Afro-Asian bloc voted to end discussion before the German delegate's proposals, which strongly condemned Sri Lanka for using arguments about state sovereignty to deflect calls for an international investigation into crimes against humanity, could be considered by the Council.¹⁵⁴

The most significant example of collective regional action as a form of anti-imperialist opposition came with the consideration of Sudan by the Council. Sudan, as detailed above, had been considered under the 1503 procedure at the Commission and in 2005, in one of its last acts, the Commission appointed a Special Rapporteur for Sudan.¹⁵⁵ The conflict in the Darfur region of Western Sudan had started in 2003 and even though a peace agreement was negotiated in 2006 hostilities continued and there was some considerable evidence that the Sudanese government was continuing to use proxy fighters, in the form of the Janjaweed militia, to continue to commit systemic human rights abuses. During discussions and debates on action against Sudan the Africa group continued to protect Sudan, either repeating statements frequently so as to unbalance the nature of the debate at the Council, or by insisting on speaking on behalf of Sudan as the Tunisian delegate did in 2007 when he claimed that Sudan was cooperating with the Council when in fact it was blocking access to the country.¹⁵⁶ Sudan used the language of anti-imperialist institutional opposition when exercising its right to reply at the Council; at the Third Session of the Council in 2006 the Sudanese delegate claimed that Sudan was the victim of an "international campaign to offer false information" and at the Fourth Special Session of the Council in 2006 claimed that this was another attempt by the West to undermine "the dignity and sovereignty of weak states."¹⁵⁷ At the Fourth Session the Algerian delegate delivered a statement on behalf of the African bloc arguing that the Council must not adopt a "heavy-handed response aimed at naming and shaming an African government."¹⁵⁸ Both the OIC and the African blocs also argued, using a strand of anti-imperialist ideological opposition, that in order to address the

¹⁵⁴ Eduard Jordaan 'South Africa and Abusive Regimes at the UN Human Rights Council' (2014) 20 Global Governance 233, 243-4.

¹⁵⁵ E/CN.4/RES.2005/82 2005.

¹⁵⁶ Freedman *The United Nations Human Rights Council: A critique and early assessment* (Routledge 2013) 202-3.

¹⁵⁷ Sudanese delegate 3rd Session 29 November 2006, 4th Special Session 12 December 2006 full video of the proceedings can be found at <<http://www.un.org/webcast/unhrc/archive.asp?go=014>> accessed 1 December 2012.

¹⁵⁸ Algerian delegate Ibid.

ongoing crisis in Darfur more aid and financial assistance should be given by Western states to Sudan, implicitly raising the notion of sovereign inequalities being the cause of human rights violations.¹⁵⁹

The Council's consideration of LGBT Rights, led to outright displays of anti-imperialist opposition - principally ideological opposition that appeared relativistic but was in fact anti-hegemonic. When in 2011 the Council passed a Resolution on human rights, sexual orientation and gender identity, the 19 votes in opposition came from the Afro-Asian bloc and South Africa, the one African nation that voted in favour of the Resolution, was accused of "Westernising" human rights.¹⁶⁰ In 2012, in response to a proposed panel discussion on LGBT rights the Pakistani delegate argued that as the Vienna Declaration, from the Second World Human Rights Conference in 1993, had acknowledged the importance of "regional particularities and various historical, cultural and religious backgrounds" the OIC group were entitled to oppose the consideration of a report on LGBT Rights at the Council.¹⁶¹ In 2014 the Council passed a second resolution on LGBT Rights but Egypt and other African states attempted to insert a series of amendments removing all reference sexual orientation.¹⁶² One observer from the International Service for Human Rights noted that the issue had cemented a "hard line" bloc of objectors that were willing to use procedural mechanisms to ideologically oppose any reform in this area.¹⁶³

Conclusion

The Commission was originally intended to be a body for promoting human rights in a Western model and its early activities, which mostly involved supervising the drafting of the human rights covenants and running promotional events, reflected the priorities of both Western and Soviet powers. The West wanted to promote human rights for ideological reasons and the Soviets were broadly willing to acquiesce in the creation of a UN human rights body provided its ipsetic potential was severely limited. The large expansion of the UN in the 1960s and the Third World bloc's growth in the General Assembly allowed it to take greater

¹⁵⁹ Freedman (n 40) 72.

¹⁶⁰ Jurist 'UN rights council passes first gay rights resolution' 7 June 2011 available at <<http://jurist.org/paperchase/2011/06/un-rights-council-passes-first-gay-rights-resolution.php>> accessed 6 July 2015 as are all subsequent citations.

¹⁶¹ Letter from Zamir Akram Coordinator of the OIC group on Human Rights to Laura Lasserre, President of the Human Rights Council 14 Feb 2012 available at <<http://www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/OIC%20TO%20PRESIDENT.PDF>>.

¹⁶² Suzanne Nossel 'The Closeted Continent: Gay Rights in Africa' Foreign Policy 8 Oct 2014 available at <http://www.foreignpolicy.com/articles/2014/10/08/the_closeted_continent_gay_rights_africa>

¹⁶³ Michael Ineichen 'Polarisation over human rights an indication of progress' ISHR 29 Sep 2014 available at <<http://www.ishr.ch/news/polarisation-over-human-rights-indication-progress#sthash.c2o70rk9.dpuf>>

control of the Commission's agenda. The focus on apartheid was not without cause – it was a significant human rights crisis and many of the formerly colonialist states, either out of self-interest or latent neo-imperialism, were reluctant to take action. Significantly apartheid became the chief justification for double standards which was the vehicle for anti-imperialist institutional and ideological opposition at the Commission. Anti-imperialist opposition occurred in spite of the relative dominance of the Third World bloc over the Commission and was eventually a significant contributory factor to its eventual demise and despite substantial institutional reforms anti-imperialist opposition continued at the Council.

Double standards undermined the capacity for the Commission and the Council to engage in the shaming of states as human rights violators. As these were both political bodies they depended upon political mechanisms as the basis of their protection mandate and double standards from the Third World bloc resulted in these mechanisms only working in a limited range of cases (i.e. South Africa, Israel) and not in other cases. The protection of some states within the Third World bloc states from political condemnation as a human rights violating state undermined the protection mandate of both organisations. But it was the presence of the protection mandate in the first place, or in the case of the Commission attempts to apply its protection mandate outside of the circumstances in which it was intended to operate that specifically led to anti-imperialist opposition. Anti-imperialist ideological opposition aimed at decolonising international human rights law by recognising cultural differences in human rights or protecting previously marginalised sets of rights was relatively rare in both the Council and the Commission. Many of the instances where decolonial anti-imperialist ideological opposition appeared to take place, such as the defensive relativism towards LGBT rights in the Council, were in fact anti-hegemonic opposition to the very idea of human rights.

The UN, as noted at the beginning of this chapter, was an organisation constructed to preserve the residual imperialism of formerly colonialist states and the fact that there was a strong backlash to attempts to tackle apartheid from these states was evidence of the continued problem of residual imperialism. However anti-imperialism is not just a result of the residual imperialism of international organisations or the neo-imperialism of international human rights law's content. The next chapter analyses the creation of the African Charter and the types of opposition to the African Commission and Court of Human Rights. The African Charter successfully reprioritised the content of international human rights law in a genuinely decolonial manner, as it envisaged a distinctly new form of human rights that recognised the material needs of postcolonial states. Yet forms of anti-imperialist opposition persisted against

the regional organisations created to enforce the charter indicating that the causes of opposition go beyond objections to the origins of international law. It also persisted in spite of these regional organisations being created outside the residually imperialist framework of international law. Rather as this chapter has indicated as organisations acquire a protection mandate its ipsetic potential poses a threat to states, even if, as was the case with the mechanisms to deal with the human rights abuses emerging from apartheid, state parties agree with the adoption of a protection mandate.

CHAPTER FOUR

Opposition within the African Human Rights system

Introduction

In December 1979 an expert group met in Dakar to start preparations on a draft African human rights charter. The African Charter of Human and Peoples' Rights ('the Charter') was opened for signatories in 1981 and came into force in 1986. The African Commission of Human and Peoples Rights ('the Commission'), which had been mooted since 1969, became operational in 1987. This Chapter examines opposition to the Commission and other supranational bodies enforcing the Charter looking at how forms of anti-imperialist opposition persisted in regional organisations. Institutional opposition, as chapter one detailed, is a reaction to an organisation's protection mandate – the legal powers of an organisation to protect rights in sovereign states – and takes the form of a reassertion of state sovereignty. Anti-imperialist institutional opposition was predicated on the notion that the sovereignty of postcolonial states was relatively unequal to other states and international law was an instrument for perpetuating sovereign inequalities. Ideological opposition, as chapter two detailed, was where states opposed human rights organisations because of philosophical objections to the content and nature of the law the organisation was tasked with protecting. Anti-imperialist ideological opposition was predicated on the notion that international human rights law was neo-colonialist and needed to be reprioritised to reflect the needs of postcolonial states. Regional human rights systems in postcolonial states were discussed in chapters one and two. What distinguishes the African Commission, from organisations such as the ASEAN Human Rights Commission, is that like the European Court of Human Rights and the Inter-American Court of Human Rights it has functioning judicial organs and an extensive caselaw. This makes it an appropriate case study to examine how anti-imperialist opposition can continue within regional organisations. This is particularly important as the African Charter addressed many of the underlying concerns that anti-imperialist ideological opposition had with the substance of international human rights law. The persistence of forms of anti-imperialist opposition, even where the substance of human rights law had been reprioritised and the organisation for their enforcement existed outside the imperialist context of international law, indicates that the supranational protection of human rights has an element of inherent imperialism to it that cannot be removed by decolonising human rights law or regionalising its protection.

The creation of the Commission represented an impressive rate of progress given that a decade earlier the Organisation of African Unity (OAU) seemed to be institutionally averse to any mechanism to protect human rights.¹ Some writers, such as George Mugwanya and Vincent Nmeihelle, have attempted to trace a history of human rights within the OAU, citing the numerous organisational commitments to anti-apartheid; however this interpretation needs to be treated with caution.² At OAU summits the OAU secretariat advocated decolonisation and supported anti-apartheid measures but this was part of an anti-colonial agenda. As noted in chapters one and three there was no direct correlation between anti-apartheid and the acceptance of human rights or organisational protection mandates. The rhetoric of human rights in the anti-apartheid campaign did not extend to the systemic human rights abuses of postcolonial states, as the case of the Ugandan and Kenyan Asians detailed in the previous chapter illustrated. Additionally the OAU's rigid adherence to the doctrine of non-interference in the domestic affairs of member states hindered attempts to protect human rights within member states.

Kofi Kufuor argues that some of the standard explanations about the causes of the Charter's formation – such as the growing importance of human rights in US foreign policy under President Carter, the widespread condemnation of the dictatorships in Uganda and Equatorial Guinea in the late 1970s and the growing institutional faith in the OAU – are inaccurate as neither of these factors were particularly decisive in the Charter's formation.³ At the African Conference of the Rule of Law, held in Lagos in 1961, proposals were advanced for an African Convention on Human Rights with a court to protect human rights, but these proposals were shelved and whilst discussed at the summit conference of the OAU in 1963 no conclusion was reached.⁴ In 1967 a conference of jurists from Francophone states made a similar proposal which was not discussed by the OAU but a year later at the First World International Human Rights Conference the Nigerian delegate campaigned for the establishment of regional commissions, although this did not feature in the conference communiqué. A 1969 UN regional seminar in Cairo, attended by representatives from nineteen African states, concluded that a regional human rights commission should be created but little happened.⁵ During the 1970s the OAU faced a dilemma about how to respond to personalist dictatorships

¹ UO Umozurike 'The African Charter of Human and People's Rights' (1983) 77 AJIL 902.

² George Mugwanya *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (Transnational Publishers, 2003) chp.1. & Vincent Nmeihelle *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff 2001) 50-75.

³ Kofi Kufuor *The African Human Rights System: Origin and Evolution* (Palgrave Macmillan 2010) 11-22.

⁴ K Mathews 'The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples Rights' (1987) 34 African Today 85,88.

⁵ Umozurike (n.1) 904.

- the common term for the regimes of Idi Amin (Uganda) Jean-Bédél Bokassa (Central African Republic) and Marcias Nguema (Equatorial Guinea) – whilst safeguarding the organisational principle of non-interference.⁶ In 1975 the Government of Tanzania criticised the appointment of Idi Amin as Chair of the OAU, noting that the organisation was acting like a “trade union” for governments.⁷ The Tanzanian statement noted the sheer hypocrisy of calling “for the isolation of South Africa because of its oppression” whilst at the same time continuing cooperation with Uganda where “the Government survives because of the ruthlessness with which it kills suspected critics”.⁸

Whilst Kufuor is probably, correct about there being no definitive cause for the creation of the Charter the experience of personalist regimes in the late 1970s certainly made the OAU collectively more open to the idea that the human rights abuses within individual members states were a matter of organisational concern. In 1979 the OAU Assembly of Heads of States and Government passed a resolution calling for a conference to draft an “African Charter on Human and Peoples’ Rights” which would also provide for “the establishment of bodies to promote and protect human and peoples’ rights.”⁹ This marked the start of the creation of the African Human Rights system – which collectively comprises of the African Commission on Human and Peoples Rights and the African Court of Human and Peoples Rights. During the 2000s this was complimented by the creation sub-regional courts with a human rights jurisdiction, such as the Court of Justice of the Economic Court of West African states, the East African Court and the Tribunal of the Southern African Development Community which have emerged through the process of economic integration between states in their respective sub-regions.

The African Charter represents the most concerted and comprehensive attempt by postcolonial states to create a human rights instrument that diverged from the imperialist paradigms of international human rights law described in chapter two. Bina Okere argues that the Charter attempted to create a concept of human rights that rejected the politics of human rights coming from both the east and west, allowing a genuinely new conception of human rights to emerge.¹⁰ The Charter was a genuinely decolonial instrument in that it attempted to diverge from the existing epistemic constraints of international human rights law and envisage a genuinely new paradigm of human rights that departed from existing paradigms of human

⁶See Samuel Decalo ‘African Personal Dictatorships’ (1985) 23 *The Journal of Modern African Studies* 209.

⁷ Reprinted in Colin Legum (ed.) *Africa Contemporary Record*, 1975-76 (London 1976) 22-24.

⁸ Ibid.

⁹ AHG/Dec.115 (XVI) Rev. 1 1979.

¹⁰ B Obinana Okere ‘A Comparative Analysis with European and American Systems’ (1984) 6 HRQ 141.

rights. The decolonial project Walter Mignolo argued attempted to empower “racialized subjects” helping them “to regain the human dignity that ... [the] imperial project...took away from them.”¹¹ Decolonialism provides a methodology for removing human rights from its Eurocentric foundations and hence the imperial context of international human rights law’s formation.¹² Therefore if the concerns behind ideological anti-imperialism are ever to be addressed it is important to understand how a decolonial human rights instrument could be created. From the work of decolonial theorists it is possible to discern three specific components of a decolonial human rights instrument.

Firstly there would need to be a distinct sense of ownership of these rights and their content, shape and realisation as Mignolo notes elsewhere “who speaks for the human” is the most important question in human rights.¹³ This means that institutions need to be “de-westernised” which Mignolo in his engagement with the works of Kishore Mahbubani, describes as meaning “that the rules of the game and the shots are no longer called by Western players and institutions.”¹⁴ Secondly the epistemological framework from which rights were derived would need to be distinct. Both Boaventura De Sousa Santos and Nelson Maldonado-Torres have argued that there needs to be a decolonial epistemological turn that would dismantle “relations of power and conceptions of knowledge that foment the reproduction of ...geo-political hierarchies.”¹⁵ From an African perspective Sabelo Ndlovu-Gatsheni argues that this involves expereinces“ from the vantage point of those epistemic sites that received the ‘darker side’ of modernity” which involved engaging with “appropriations, epistemicides, and denials of humanity” caused by the colonial project in Africa.¹⁶ As detailed in chapter two international human rights law used an epistemic paradigm that was distinctly western and contingent upon a western conception of the individual. Thirdly the content of human rights would need to be, as Macarena Gómez-Barris argues, “re-purposed” to genuinely account for the needs and struggles of the marginalised and

¹¹ Walter Mignolo ‘Citizenship Knowledge and the Limits of Humanity’ (2006) 18 *American Literary History* 312, 314.

¹² José-Manuel Barreto ‘Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto’ (2012) 3 *Transnational Legal Theory* 1.

¹³ Mignolo *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011) 239.

¹⁴ Mignolo ‘Epistemic Disobedience, Independent Thought and De-Colonial Freedom’ (2009) 26 *Theory, Culture & Society* 1,3. See also Kishore Mahbubani *Can Asians Think? Understanding the Divide Between East and West* (Steerforth Press, 2001).

¹⁵ Boaventura de Sousa Santos *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers, 2014) 19-34. Nelson Maldonado-Torres ‘Thinking Through the Decolonial Turn: Post-Continental Interventions in Theory, Philosophy, and Critique—An Introduction.’ (2011) 2 *Transmodernity* 1.

¹⁶ Sabelo Ndlovu-Gatsheni, ‘Why decoloniality in the 21st century’ (2013) 48 *The Thinkers* 10, 15.

oppressed.¹⁷ As detailed in chapter two the ideological reprioritisation of human rights was a significant element of anti-imperialist ideological opposition. However, as chapter three notes, the ideological reprioritisation of human rights was a marginal aspect of opposition from the Third World bloc at the UN Commission on Human Rights and UN Human Rights Council.

This chapter argues that the African Charter, under the criteria set out above, was a genuinely decolonial human rights instrument. This is set out in the first section below but as the second section outlines, the Commission, the principle mechanism for protecting the rights contained in the Charter was subject to both institutional and ideological pre-emptive opposition that created an organisation with a weak protection mandate. This opposition was distinctly anti-imperialist in nature and as the third and fourth sections of this chapter demonstrate, this continued in a pre-emptive form towards the African Court of Human Rights and in a direct form towards the tribunals of Regional Economic Communities who also enforced the Charter. As outlined in the conclusion of the previous chapter the persistence of anti-imperialist forms of opposition in UN human rights bodies, even after the Third World bloc had gained a degree of control over them, could be explained by the fact that the UN itself was an institution constructed within the colonial-imperial template of international law and preserved the power of the formerly colonialist states. However, none of the same arguments applied to the regional institutions described in this chapter. These were organisations created outside of the colonial-imperialist structures of international law and applied a genuinely decolonial set of human rights.

Whilst anti-imperialist opposition at the regional level is less intense and direct than at the international level, the persistence of forms of anti-imperialist opposition raises broader issues about the nature of human rights enforcement. What appears to be a unifying theme behind the anti-imperialist opposition detailed in this chapter, as it was in the previous chapter, is that anti-imperialist arguments emerge in response to an organisation's protection mandate. A protection mandate, as chapter one outlined, gives an organisation an ipsetic potential – the capacity to give itself increasing competencies to declare what the law should be and can result in the organisation claiming sovereign-like authority.¹⁸ States sought to curb or eliminate this when constructing regional mechanisms, using anti-imperialist justifications for their pre-emptive opposition. The next chapter will go onto address, how this highlights that whilst international human rights law can be decolonised removing, it from its imperial

¹⁷ Macarena Gómez-Barris 'Mapuche Hunger Acts: Epistemology of the Decolonial' (2012) 3 Transmodernity 120, 127.

¹⁸ For an explanation see chapter 1

context thus eliminating the rationale for anti-imperialist ideological opposition, the protection of human rights at the supranational level is inherently imperialist.

(1) The African Charter of Human Rights and the decolonisation of human rights law

In 1979 Leopold Senghor, the then President of Senegal, stated that the Charter needed to “keep constantly in mind our values of civilization and the real needs of Africa.”¹⁹ The UN organised a conference in Monrovia in September 1979 with experts from across Africa, which issued a proposal on the creation of an African commission of human rights. Two months later, under the terms of reference set by the OAU, a group of experts held a conference in Dakar which used a research paper prepared by Keba M’Baye the then President of the International Court of Justice, as the basis for deliberation. They eventually produced a set of proposals for a wide ranging charter on human rights but with only vague references to a commission or enforcement mechanism. After some delays, the Dakar draft eventually formed the basis of the final text of the African Charter on Human and Peoples’ Rights which was signed at Banjul in January 1981. It contained both Third Worldist sentiments on the importance of collective economic rights, and a series of notionally cultural framings of rights, designed to give a regional sense of ownership to human rights law.²⁰

The Charter gives economic, social and cultural rights the same status as civil and political rights: Article 15-17 protects the right to work, health and education. It also tackles the inherent western individualism of human rights in Articles 19–24 by protecting a series of peoples, or group rights designed to protect communities rather than individuals. Many of the deficiencies of international law and international human rights law that had been raised by the Third World bloc in the 1970s during the campaign for a New International Economic Order (NIEO) were directly addressed in the Charter. Its preamble specifically reaffirms states adherence to the “principles of human and peoples’ rights and freedoms” contained in the instruments of “the Movement of Non-Aligned Countries and the United Nations.”²¹ By giving equal importance to existing international human rights law and the Third World bloc’s campaigns for economic justice, the Charter can be read as a realisation of campaign for the reprioritisation of human rights law to reflect the concerns of postcolonial states. One of the problems with analysing the origins of the Charter is that no record of its Travaux

¹⁹ Chidi Odinkalu ‘Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples’ (2001) 23 HRQ 327,336.

²⁰ Ibid.

²¹ 1981 African Charter of Human and Peoples Rights (ACHPR) OAU Doc. CAB/LEG/67/3, Preamble.

Préparatoires exists, so it is difficult to assess the forces behind its formation.²² An analysis of the literature on the Charter and the Commission's decisions, gives some indication as to purpose and intention of its framers.

Although the right to Work, Health and Education are protected in the International Covenant of Economic Social and Cultural Rights (ICESCR) there are two crucial differences between it and the Charter. Firstly, by being given equivalence with civil and political rights, the division between rights protecting material conditions and rights protecting liberties - a division largely engineered by the US during the drafting process of the human rights covenants at the UN Commission on Human Rights in the 1950s – was extinguished by the Charter which reaffirms the interdependence of different rights.²³ The Charter's preamble states that the two sets of rights "cannot be dissociated" from one another and that the "satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."²⁴ Secondly the Charter does not contain the language of progressive implementation, as the ICESCR does, placing a much stronger obligation on states to implement and protect economic and social rights. As Chidi Odinkalu argues this broke "down the dichotomies and artificial barriers imposed on the implementation of economic, social and cultural rights."²⁵ Decisions and reports from the Commission affirmed this view; in 1992 the Commission found that states were required to include these rights in their national constitutions and practically realise rights, such as the right to work, by incorporating positive legal protections, such as laws protecting trade unions, into national law.²⁶ Whilst the provisions on economic social and cultural rights were extensive they were criticised by some writers who argued that they were of a limited nature and didn't include guarantees of the right to housing, food or an adequate standard of living.²⁷

The Charter absorbed some of the NIEO's principles goals directly reflecting elements of the two General Assembly Resolutions containing the core NIEO instruments that were outlined in chapter two. Article 21 of the Charter guarantees the right of "peoples" to "freely dispose of their wealth and natural resources" echoing the UN General Assembly Declaration on

²² See Corinne Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa* (Intersentia 2002) 110

²³ See Daniel Whelan *Inadvisable Human Rights: A History* (University Pennsylvania Press 2010) chp.6

²⁴ ACHPR Preamble

²⁵ Odinkalu (n. 19) 366

²⁶ *Report on the Twelfth Session of the African Commission on Human and Peoples Rights 1991-2 held in Banjul, The Gambia 12-21 Oct. 1992* African Society of International Law and Comparative Law Vol.4 (1992)

²⁷ Yvonne Klerk 'Forced Labour and the African Charter of Human and Peoples Rights' from V Dankwa (eds.) *The African Charter of On Human and Peoples Rights: Development, Context, Significance* (Marburg, African Law Association, 1990) 234.

Permanent Sovereignty over Natural Resources which stated that control of “natural wealth and resources must be exercised in the interest of ...the well-being of the people of the State concerned.”²⁸ Article 22 of the Charter sets out similar guarantees to Article 7 of the Charter of Economic Rights and Duties of States. Both protect the “the economic, social and cultural development” of a state’s people and enshrine of the right of states to choose the system by which such development is delivered.²⁹ In this sense Upendra Baxi’s praise that the inclusion of the right to development in the Charter represented “the development of the right to development” is deserved as the Charter placed specific features of the NIEO’s economic justice agenda into a rights orientated framework.³⁰ JB Ojwang argued that the promotion of the right to development as a core right was interdependent with other more traditional civil and political rights and had a distinctly African basis to it as it was “guided by the outstanding concerns and realities of society.”³¹ Unlike the western conception of rights, Ojwang argued, an African conception of rights did not insist on preserving unequal material conditions. Ojwang was not arguing for a radical political programme of property appropriation but rather was making a broader observation about the assumptions behind the formation of the Charter. Other writers in the 1980s also argued that in order to have relevance to African societies, human rights needed not just to safeguard abstract legal relationships but also provide material security.³² The Charter, by protecting both the right to development and private property against unlawful appropriation, attempts to provide a framework of rights to provide a holistic guarantee of material security. In this sense the Charter contained a genuinely decolonial framework of human rights in that it did not preserve existing colonial-era hierarchies of rights and adapted human rights to the context of African states. This met both the second and third criteria for a decolonial human rights instrument outlined in the introduction.

One significant feature of the Commission’s jurisprudence in this area was that it took a holistic approach to development in tandem with other rights. In the *Endorois* case, which involved a petition from the Endorois people who were evicted from ancestral land at Lake Bogoria in central Kenya, the Commission emphasised the role of consultation with groups as

²⁸ A/RES 1803 (XVII) 14 Dec 1962, para 1.

²⁹ A/RES 3281 (XXIX) 12 December 1974

³⁰ Upendra Baxi *Human Rights in Post Human World* (4th ed. OUP 2011) 124.

³¹ JB Ojwang *Laying a Basis for Rights : Towards a Jurisprudence of Development* (Nairobi University Press 1992) 34.

³² For examples see Claude Ake ‘The African Context of Human Rights’ (1987) 34 *Africa Today* 5 and Mark Anikpo ‘Human Rights and Self- reliance in Africa’ in George Shepherd and Anikpo, *Emerging Human Rights: the African Political Economy Context* (Greenwood Press 1990).

being an important part of the right to development.³³ This placed civil and political rights within the exercise of the right to development and as Serges Kanga, notes in his commentary on the case; the protection of the right to development was linked to the wider protection of freedoms, making it an interdependent human right.³⁴ This marked a progression away from the politics that had surrounded the initial promotion of the redistributive development which as Alston argues had often been used for point scoring by the Eastern bloc or for the “Third World [bloc] to ‘distort’ the issues of human rights.”³⁵ The Charter placed the right to development within a wider context of political development and the protection of rights, which significantly diminished the capacity of political leaders to use the promotion of developmentalism as a filibuster technique to derail the protection of human rights more generally, as was the case at the First World Conference on Human Rights in 1968.³⁶

The wording of the right to development and anti-discrimination provisions in the Charter also intertwined economic empowerment with anti-colonialism. These two themes were seen in the Commission’s decisions on their interpretation. In *SEAC v Nigeria*, a case concerning the Ogoni People’s right to a clean environment, the Commission acknowledged the importance of the right to a clean environment, urging the Nigerian government to “restore cooperative economic development to its traditional role in African society” and acknowledge the “painful legacy of colonialism.”³⁷ Article 20 was explicit in its anti-colonialist stance stating that “colonized or oppressed peoples shall have the right to free themselves from the bonds of domination.”³⁸ The wording of Article 19, specifically prohibits “the domination of a people by another” reflecting a distinctly anti-colonial perspective to equality.³⁹ As Richard Kiwanuka notes in an analysis of Article 19 and 20, these provisions were intended to serve as collective rights for peoples to use against situations of colonial domination, such as was the case in apartheid South African and occupied Namibia.⁴⁰ Although Article 19 provided a specific schema of protection for minority rights within postcolonial states, Kiwanuka notes that

³³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003: 27th Annual Activity Report of the African Commission, annex 5

³⁴ Serges Kanga ‘A critical review of the jurisprudence of the African Commission on the right to Development’(2013) 57 *Journal of African Law* 196.

³⁵ Phillip Alston ‘Making space for new human rights: The case of the right to development’ (1988) 3 *Harvard Human Rights Yearbook* 3, 22.

³⁶ See Chapter Two for a description of the 1968 Tehran Conference where the discussion of the right to economic development saw states promoting the cause of development specifically to bloc consideration of their own record on civil and political rights.

³⁷ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication* 155/96 in 15th Activity Report of the African Commission on Human and Peoples Rights 2001 -2002, ACHPR/RPT 15 Annex V.

³⁸ ACHPR Art 20(2).

³⁹ ACHPR Art 19.

⁴⁰ Richard Kiwanuka ‘The Meaning of “People” in the African Charter on Human and Peoples’ Rights’ (1988) 82 *AJIL* 80.

because of the way these rights are framed there is a danger that the concept of peoples could “turn out to be counter-productive” as state parties could easily claim people’s rights were in fact state rights.⁴¹ Kiwanuka observed the government of Zaire often claimed they were acting in the interests of ‘the people’ when they were committing human rights abuses but in common with other early commentators on Charter, he had faith that provided “the Commission is allowed to function effectively” it could mitigate state parties attempts to exploit rights as a justification for their own actions.⁴² Although the anti-colonial references in group rights were designed to foster a sense of postcolonial justice, as the next chapter argues, they contributed to the assumption that human rights abuses were predominantly the responsibility of formerly colonialist states.

The Charter’s core achievement was a construction of universality that was distinct from existing conceptions of universality in international human rights law. The conceptual foundation for the universal application of human rights under the Charter is the protection of the “legitimate aspirations of the African peoples”.⁴³ However, the Charter’s preamble does not construct any new framework of legal principles for its implementation and enforcement and the obligation on signatories rests on the existing framework of treaty interpretation in international law. The substantive provisions of the Charter relating to duties and communal rights are often cited as evidence of this new universalism. Bonny Ibhawoh argues that the UDHR’s universalism, which is rooted in the citizen state distinction, is alien to traditional forms of rights in African societies and that the imposition of a strictly individualistic form of rights is paternalistic.⁴⁴ Ibhawoh’s argument alludes to the need for some form communal rights to be recognised in tandem with individual rights a theme developed by El-Obaid and Appiagyei-Atua who argue that in traditional African societies “an organic connection” exists between communal and individual rights.⁴⁵ Overall the entire framework of collective and individual economic rights meant that there was a genuine sense of African ownership over the rights in the Charter – meeting both the first and the third criteria for a decolonial human rights instrument outlined in the introduction of this chapter.

⁴¹ Ibid 97.

⁴² Ibid 100.

⁴³ Preamble ACHPR (n.21)

⁴⁴ Bonny Ibhawoh ‘Restraining Universalism: Africanist Perspectives on Cultural Relativism in the human rights discourse’ from Paul Zeleza and Phillip McConaughay (eds.) *Human Rights and the Rule of Law and Development in Africa* (U Penn Pres, 2004) pp.21-39.

⁴⁵ El-Obaid Ahmed El-Obaid and Kwadwo Appiagyei-Atua “Human Rights in Africa: A new Perspective on Linking the past and the present’ (1996) 41 *McGill Law Journal* 819,853.

The section on collective rights, contained in Articles 19-24 of the Charter, and the section on duties, contained in Articles 27-29, offers an alternate conception for the epistemic basis of rights and rights holders. Collectively these provisions go some way to addressing what Mignolo describes as the “imperial presuppositions” that underpinned the existing epistemology of human rights which were rooted in western individualism.⁴⁶ It was, Ebow Bondzie-Simpson argues, not clear whether the group rights articulated in the Charter were intended to be legally binding or whether they were simply “aspirational and exhortatory” declarations to state parties.⁴⁷ Murray and Steven Wheatley note that the Commission has allowed petitions from individuals claiming violations of these rights, especially the provisions on self-determination and minority rights.⁴⁸ One case involving Article 19 rights held that the discriminatory treatment of black Mauritians was both a violation of their right to equal treatment under the Charter and “domination of one section of the population by another” effectively combining individual civil rights and collective group rights.⁴⁹ In their exhaustive summary of the Commission’s jurisprudence on Articles 19-24, Clive Baldwin and Cynthia Morel complimented the Commission for its “broad and flexible” understanding of peoples’ rights, which allowed indigenous communities and minorities to make rights claims.⁵⁰ However, they go on to sound a cautionary note in their conclusion, observing that many of the Commission’s judgements on these rights had been ignored and that “pressure” needed to be put on states to “comply with the commitments they have made.”⁵¹ These provisions were decolonial as they recognised rights that had ontological foundations outside of liberal individualism which was associated with a distinctly western conception of rights. It is however, important to note that the degree to which these decolonial rights could be recognised and become a reality for the citizens of African states depended on the efficacy of the Commission as an enforcement mechanism.

Whilst group rights had a long history in international law and the Third World bloc had been promoting them for years, the sections on duties contained in the Charter were unique. Article 27 states that individuals have a duty to “family and society” and Article 28 requires individuals to “respect and consider his fellow beings without discrimination.”⁵² Seemingly,

⁴⁶ Mignolo (n.11) 313.

⁴⁷ Ebow Bondzie-Simpson ‘A Critique of the African Charter on Human and Peoples’ Rights’ (1988) 31 Howard Law Journal 643,654.

⁴⁸ Murray and Steven Wheatley ‘Groups and the African Charter on Human and Peoples’ Rights’ (2003) 25 HRQ 213.

⁴⁹ *Collectif des Veuves et Ayants-Droits, Association Mauritanienne des Droits, de l’Homme v Mauritania*, Thirteenth Activity Report 1999-2000, Annex V, paras 129-31.

⁵⁰ Clive Baldwin and Cynthia Morel ‘Group Rights’ from Evans and Murray (eds.) *The African Charter on Human and Peoples Rights: The System in Practice 1986-2006* (2nd ed CUP, 2008).

⁵¹ *Ibid.* 288

⁵² ACHPR Art 27 and 28.

this simply adds a correlative duty to the protection of individual rights but their precise role is very unclear. The nature of duties under the Charter was discussed in some depth by Mutua who concluded that rights were situated within conceptions of justice that were specific to a given society and in pre-colonial African societies the receipt of dignity, as the basis of rights, was contingent upon the performance of duties.⁵³ Some early writers on the Charter were concerned that state parties would use the presence of duty clauses to justify far reaching restrictions on rights.⁵⁴ Some writers, such as Gino Naldi, noted that whilst it was possible to read group rights as evidence of the 'statist' nature of the Charter, they were in fact demonstration of notionally African traditions, without much legal substance.⁵⁵ The duty provisions of the Charter remain relatively underused and many of the fears about their abuse never materialised. The provisions on collective rights and duties represent an attempt to provide a new epistemic foundation for human rights based on collective rather than individual relationships to society. This is genuinely decolonial as it envisaged a formulation of rights not caught within the colonial-era paradigm of international human rights law. However, their realisation and protection, was contingent upon a functioning human rights organisation as was their ability to remain genuinely decolonial, and not be hijacked by the leaders of postcolonial state.

(2) Opposition to the African Commission on Human and Peoples Rights

The African Commission on Human and Peoples Rights is not mentioned once in the Charter's preamble, which stresses the importance of the "duty to promote and protect human rights" without any reference to enforcement.⁵⁶ The Charter's provisions on the Commission's legal powers are opaque. Under Article 30 the Commission is empowered in very general terms to "promote human and peoples' rights and ensure their protection in Africa" but subsequent provisions give little indication as to how exactly this was to happen. The Charter's procedures to ensure the Commission's independence are detailed extensively as are the content of complaints that it could consider. The Commission consists of eleven members, serving in a personal capacity, who meet in biannual sessions to monitor compliance with the Charter. Its work consists of examining state reports on legislation, reviewing reports of special rapporteurs assigned to investigate thematic human rights issues such as the protection of human rights defenders or the prevention of torture, and hearing petitions from individuals

⁵³ Mukau Mutua 'The Banjul Charter and the African Cultural Fingerprint an evaluation of the Language of duties' (1995) 35 VJIL 339.

⁵⁴ See Richard Gittleman 'The African Charter on Human and Peoples Rights: A Legal Analysis' (1982) 22 VJIL 667.

⁵⁵ Gino Naldi "African Union and the Regional Human Rights System" from Murray and Evans (n. 50) 28.

⁵⁶ ACHPR Preamble (n. 21).

alleging human rights abuses from member states. The Charter is however silent about the Commission's capacity to enforce compliance from member states, vague about its jurisdictional competences and silent about the remedies it could offer to victims.⁵⁷

The Commission is often discussed in terms of its weakness and it appears to have three specific forms of weakness although most commentators are not particularly explicit about which form of weakness they are discussing. The most obvious is the comparative or relative weakness of the Commission. For many years it was the weakest regional human rights body and its protection mandate was much more limited in scope than the European Court of Human Rights or the Inter-American Court of Human Rights. As Okere notes the Commission had a much weaker enforcement mechanism than the European Court of Human Rights and the Inter-American Court of Human Rights and as illustrated below, the majority of the literature on the structure of the Commission acknowledges its relative weakness.⁵⁸ The Commission also has administrative weaknesses; for many years it operated on relatively limited resources and its sessions had to be held in different locations. As Frans Viljoen notes the Commission became increasingly dependent on European and Canadian donor funding exposing it to the general criticism that it was part of a western attempt to spread human rights.⁵⁹ Finally the Commission can be considered weak because it lacks autonomy from the OAU and its member states. Even after significant developments in the Commission and at the AU in the early 2000s, the Commission is still not fully autonomous from the AU. This makes it prone to institutional capture by the AU or 'state capture' by becoming a vehicle for states parties to project their own interests under the guise of a human rights organisation. As Vincent Nmeihelle notes whilst state capture of the Commission was often speculated about, there was no evidence that Commission had actually been subject to institutional capture or had issued decisions, which were subject to procedural biases.⁶⁰ Yet the fact that the appointment of the Commissioners remained in the hands of state parties and they sought to influence the process of their appointment contributed to the sense that the Commission was not truly independent. Infamously Moleleki D. Mokama of Botswana served as the Attorney-General of Botswana whilst at the same time serving on the Commission.⁶¹

⁵⁷ Ibid Art 30 -43 (Organisation of the Commission), Art 47-56 (Communications from states, individual communications were somewhat vaguer – see below).

⁵⁸ Okere (n. 10).

⁵⁹ Frans Viljoen *International Human Rights Law in Africa* (2nd ed. OUP 2013) 320-30.

⁶⁰ Nmeihelle (n 2) 172-75.

⁶¹ NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) 3 Yale Human Rights and Development Law Journal 45, 71.

The weakness of the Commission stems from its evolution which can be read as a form of pre-emptive institutional opposition. As shown in the first part of this section during in the process of the Charter's formation states intentionally gave the Commission a weak protection mandate that would limit its future ipsetic potential. This directly led to the problems of enforcing the Commission's decisions discussed in the second part of this section. The final part of this section argues that the Commissions weaknesses and institutional opposition it faced are explicable as acts of pre-emptive anti-imperialist opposition.

(i) *Pre-emptive institutional opposition in the Commission's formation*

There were two key aspects of pre-emptive opposition in the Commission's formation. Firstly, clawback clauses in the Charter limited the operation of any enforcement mechanism by truncating the scope of states obligations in a way that would limit any supranational organisation's capacity to enforce rights. Clawback clauses are different from other equivalent provisions in international human rights law, such as derogation clauses, as they are mechanisms that allow the unlimited restriction of rights in national law and do not contain proportionality tests. A comparison between Article 11 of the African Charter and Article 11 of the ECHR - both of which protect the right to freedom of association - illustrates the difference. The Charter states that the exercise of freedom of association "shall be subject only to necessary restrictions provided for by law" and goes onto give a series of indicative examples of where freedom of association may be limited.⁶² The ECHR states that "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society" and then goes onto give a closed list set of circumstances in which laws may be passed limiting the right to freedom of association.⁶³

On the face it the distinction is not vast but the phrase "necessary in a democratic society" gives a standard by which a state's claim of necessity in restricting rights can be assessed by a human rights organisation. Absent such a standard a state is free to argue necessity from a subjective perspective to suit their interests. This has the effect of limiting the scope and capacity of a human rights organisation as it deprives them of an objective standard of rights limitations which they can use to scrutinise a state's human rights record and afford individuals within the state human rights protection. Equally the circumstances under which the right to freedom association may be limited in the ECHR are far more tightly defined than in the Charter meaning that it is comparatively harder for a state party to argue under the

⁶² ACHPR Art. 11

⁶³ 1950 European Convention on Human Rights Art 11

ECHR that the restriction of the right is legitimate. So to directly compare the two instruments from the perspective of protecting human rights; the right to freedom of association under the African Charter can be subject to a wide variety of restrictions in individual states and under its formulation in the Charter there is only a limited scope for a supranational organisation to review these limitations. Under the ECHR states can still impose far reaching restrictions on the freedom of association but the framing of the right gives a supranational organisation greater room to review such restrictions and an objective standard by which to assess them. There are similar formulations in other parts of the Charter; Article 6 protects the Right to Liberty and Security of the Person but states that “no one may be deprived of his freedom except for reasons and conditions previously laid down by law.”⁶⁴

The textual provisions of the Charter seem to indicate that clawback clauses were intended to favour a state party’s interpretation of legislation restricting human rights. Richard Gittleman links clawback clauses to the functioning of the Commission arguing that effect of clawback clauses was to ensure that the Commission provided not a “scintilla of external restraint upon a government’s power to create laws contrary to the spirit of the rights granted” under the Charter.⁶⁵ Early commentary on the Charter identified clawback clauses as a significant problem for the protection of rights by the Commission. Writing in 1985 D’Sa argued clawback clauses permitted the suspension of rights “in a wide range” of “undefined” circumstances.⁶⁶ Mathews went further arguing in 1987 that clawback clauses restricted rights “in such a manner as to make them somewhat difficult to be enjoyed” and concluded that they indicated that states did not intend to actually be bound by the civil and political rights provisions of the Charter.⁶⁷ Clawback clauses originated at the Dakar conference on the African Charter where state delegates sought to balance the competing concerns of state sovereignty and the creation of a regime for protecting human rights. As argued below the delegates at the Dakar conference was more concerned with creating an instrument that states would sign up to, rather than creating an instrument that could ensure the long term protection of human rights.

The Commission has resisted the notion that clawback clauses should be used by states to arbitrarily limit rights or resist the operation of the Commission’s protection mandate. In *Legal*

⁶⁴ ACHPR Art 6 (n. 21).

⁶⁵ Gittleman ‘The Banjul charter’ from Claude Welch, Jr. & Ronald Meltzer, eds., *Human Rights and Development in Africa* (State University of New York Press, 1984)

⁶⁶ R D’Sa ‘Human and Peoples’ Rights: Distinctive Features of the African Charter’ (1985) 29 *Journal of African Law* 72, 76.

⁶⁷ Mathews ‘The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples’ Rights, 1981’(1987) 34 *Africa Today* 85, 92.

Resources Foundation v Zambia it held that “no state party to the Charter should avoid its responsibilities by recourse to the limitations and claw-back clauses.”⁶⁸ The Commission has also criticised the use of clawback clauses to suspend rights in times of emergency holding that “limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies.”⁶⁹ Clawback clauses, the Commission noted, have been used to give “credence to violations which by implication Viljoen argues means that states should not use clawback clauses to deny access to the Commission.”⁷⁰ However Laurent Sermet, writing in 2007 argues that despite the Commission’s efforts clawback clauses allow rights to be “defined, implemented and applied in a manner that may deprive [them] of any real substance.”⁷¹ In this context clawback clauses are a form of pre-emptive institutional opposition as they guarantee that the enforcement of the rights in the Charter will be limited as clawback clauses mean that there is in effect a presumption in favour of a state’s limitations on rights. Therefore any supranational organisation with a protection mandate would as a result of clawback clauses have its ipsetic potential limited by clawback clauses.

Secondly the legal structure of the Commission had a deliberately weak protection mandate that was designed to limit its ipsetic potential. As stated earlier no definitive record of Travaux Préparatoires of the Charter exist but Bertrand Ramcharan has managed to publish several documents from the UN sponsored Monrovia Conference in July 1979. Ramcharan’s article describes how the original proposals from Ghanaian jurists at the Monrovia conference envisaged an activist Commission with a broad mandate but these proposals were considerably watered down at a subsequent conference of experts in Dakar in 1979.⁷² The final draft of the Charter reflects the Dakar draft. For example the Monrovia draft contains references to powers of the Commission to provide good offices to member states where violations were occurring which was omitted in the final draft. The Monrovia draft also states that the Commission should be empowered to “[study] situations of alleged violations, their causes and manifestations” which again was omitted in the final draft of the Charter.⁷³ Significantly as Viljoen notes earlier drafts of the Charter contained provisions for a Commission which would have the “power of initiative to take action in response” to human

⁶⁸ *Legal Resources Foundation v. Zambia*, Comm. No. 211/98 (2001) para.70.

⁶⁹ *Media Rights Agenda & Constitutional Rights Project v Nigeria* Comm. Nos. 105/93 (1998) para 64-5.

⁷⁰ Viljoen ‘Admissibility under the African Charter’ From Evans and Murray (eds.) *The African Charter on Human and Peoples Rights: The System in Practice 1986-2006* (1st ed. CUP 2002) 72.

⁷¹ Lauren Sermet “The absence of a derogation clause from African Charter on Human and Peoples Rights: a critical discussion” (1992) 7 *African Human Rights Law Journal* 142.

⁷² Bertrand Ramcharan ‘The Travaux Préparatoires of the African Commission on Human Rights’ (1992)13 *Human Rights Law Journal* 307

⁷³ *Ibid.*

rights violations.⁷⁴ The final draft of the Charter contains no equivalent provision and whilst the Commission is mandated to ensure the protection of human rights its powers are limited to “conditions laid down by the present Charter” which is a deliberately vague position as the Charter contains few reference to the actual legal powers of the Commission.⁷⁵ Both Viljoen and Ramcharan indicate that during the latter stages of the drafting process, states opposed a Commission with an expansive protection mandate preferring instead to create an organisation that was more directly under the control of the state parties. Viljoen noted that during the Monrovia discussions there was a considerable disagreement among the delegates over the promotional and protective functions of the Commission.⁷⁶

The provisions on individual petitions in the Charter are similarly vague. Article 55 of the Charter states that the Commission should “make a list of the Communications other than those of State Parties” and this list would then be given to all of the members of the Commission for them to consider which ones were admissible. This placed considerable limitations on the Commission’s capacity to protect individual rights and as Rachel Murray notes the only action that the Charter proposed the Commission take in these cases was to refer them to the OAU.⁷⁷ This would seemingly put state governments in control of the Commissions’ capacity to enforce cases involving violations of an individual’s human rights. The Commission has been able to circumnavigate these uncertainties by adopting rules of procedure at its Third Session that clarified the process for individual applications. This was an early example of the Commission’s ipsetic potential and the OAU resisted pressuring the Commission to adopt a strict approach on the confidentiality requirements under Article 59 of the Charter.⁷⁸ As Claude Welch noted, by 1990 nearly 105 petitions had been filed with the Commission but all of them remained confidential and the Commission had yet to take any steps on any of them.⁷⁹

At an international conference on regional human rights mechanisms in 1993 delegates noted that Commission had yet to complete the consideration of a single individual application. As Murray notes the Commission’s relative inaction in its first decade needs to be seen in the context of its severe underfunding and the limited resources provided by the OAU to assist its

⁷⁴ Viljoen ‘The African Charter on Human and Peoples Rights: The Travaux Préparatoires in the Light of Subsequent Practice’ (2004) 25 HRLJ 316, 318.

⁷⁵ ACHPR Art. 45(3).

⁷⁶ Viljoen (n. 74).

⁷⁷ Murray ‘Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples’ Rights’ (1997) 46 ICLQ 412.

⁷⁸ Ibid. 414.

⁷⁹ Claude Welch ‘The Organisation of African Unity and the Promotion of Human Rights’ (1991) 29 The Journal of Modern African Studies 535, 547.

operation.⁸⁰ The OAU appears to have wanted to shape an organisation that was largely promotional and complimentary to its own efforts to protect human rights. However, given the high premium the OAU placed on non-interference in the affairs of member states it was not clear how the Commission could function within the OAU's broader legal and policy framework. Under the Charter's framework the Commission is in a partially subservient role to the OAU Assembly of Heads of State and Government and required its authority to publicise its decisions.⁸¹ These provisions Rowland Cole argued had the effect of putting the Commission under the political control of the OAU.⁸² The Commission's promotional role was heavily emphasised in the final draft of the Charter – Article 45 makes only one reference to protecting rights but has three different references to the promotion of human rights. This seems intended to downplay the Commission's protective functions. This can all be read as a form of pre-emptive institutional opposition as when drafting the Charter states sought to constrict the mandate of any new human rights institution. Nevertheless the Commission was able to develop its own protection mandate over the course of the 1990s which was to have some successes. This however was an example of the Commission's ipsetic potential which was to lay the basis for future anti-imperialist opposition.

(ii) *Direct institutional opposition to the Commission's operation*

In a similar fashion to the Third World bloc at the Human Rights Committee of the ICCPR, there was reluctance towards engaging with the Commission's state reporting procedures. Under the Charter all state parties are obliged to submit a "report on the legislative measures taken" by them to implement the Charter's rights.⁸³ Beyond a requirement to report every two years the Charter is vague about the content of state reports, which as Christoph Heyns argues was part of an overall pattern of evasiveness on the key details of state obligations in the Charter's text to encourage states to ratify the Charter quickly.⁸⁴ There is limited evidence on this direct point but it squares with the overall account outlined above about pre-emptive institutional opposition in the Charter's formation. State reports are a component of a state party's overall duty to promote and protect human rights and as Evans and Murray note the process is intended to be collaborative not confrontational, reflecting the overall desire of the Charter to

⁸⁰ Murray (n 77) 414.

⁸¹ Mukau Mutua 'The African human rights system: a critical evaluation' (2000) available at: <http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF> accessed 20 July 2015.

⁸² Rowland Cole 'The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decisions?' (2010) 43 *The Comparative and International Law Journal of Southern Africa* 23,25.

⁸³ ACHPR Art. 62.

⁸⁴ Christoph Heyns (ed.) *Human Rights Law in Africa Vol. II 1997* (Kulwer Law International 1999) 56-7.

promote African values.⁸⁵ However, in practice state parties have often resisted sending in reports or submitted inadequate reports making the reporting process similar to treaty body processes in terms of delay and obstructions. The first state to report was Libya in 1988 and that year the Commission adopted Guidelines for National Periodic Reports, which emphasised the importance of reporting on both legislative measures taken to protect civil and political rights and measures that state parties were taking towards enabling economic development and the protection of natural resources.⁸⁶

In 1997, after a decade of the Commission's operation, 33 state parties had yet to submit a report. When factoring in the dates that states had ratified the Charter and submitted reports in line with its provisions, this meant that in the Commission's first decade around 15% of all state parties could be said to have been complying with the reporting obligations. A snapshot of reporting nearly a decade later reveals a slight improvement but many of the same patterns; at the Commission's 40th session, eleven states had submitted all of their reports, eight states still owed a report, fourteen states had submitted an initial report but none since and fifteen states had never reported.⁸⁷ This amounted to a compliance rate of around 20% ; a limited improvement among state parties since 1997. By this point states had arguably strengthened their commitment to the protection of human rights with the adoption of the 2000 AU Constitutive Act which placed a strong emphasis on the protection of human rights. At the 53rd session in 2013 eight states were counted as being up to date with all reporting processes whilst eleven states had yet to submit any report. The behaviour of some countries in this process is revealing; Zaire, which was heavily criticised for its refusal to comply with the Human Rights Committee, also refused to submit reports to the Commission.⁸⁸ However after the fall of the Mobutu regime and the transformation of the state into the Democratic Republic of Congo (DRC), its compliance with reporting procedures improved so that by the 53rd session the DRC was a fully up to date with all reporting procedures.⁸⁹ By contrast Zimbabwe, which in 1997 was fully compliant with the reporting procedures, was by 2013 highly non-compliant with three reports overdue. This pattern of behaviour correlates with the priority both states gave to human rights and the external perception of their human rights records. This suggests

⁸⁵ Evans and Murray 'The state reporting mechanism of the African Charter' in Evans and Murray (n. 50) 50-1.

⁸⁶ Guidelines for National Periodic Reports, Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988-1989 ACHPR /RPT 2nd Annex XII available at http://www1.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_resolution_13.pdf.

⁸⁷ Evans and Murray (n 84) p.54 – they note that the situation is in fact slightly more complex than these figures show with some states reports still pending and other states whose single submission counted as multiple reports.

⁸⁸ See Chapter One.

⁸⁹ 34th Activity Report of the African Commission of Human and Peoples Rights, p.3 available at http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013_eng.pdf > 20 July 2015.

that compliance with the Commission is linked to the way that a state wishes to project their own political interests in connection to human rights and responses to other human rights organisations. This is fairly standard institutional opposition, as was outlined in chapter one, but the initial scale of non-compliance can be read as symptomatic of a deeper institutional weakness of the Commission and of potential anti-imperialist opposition.

Another useful metric to assess institutional opposition is the relative compliance of state parties with Commission's contentious decisions. As Viljoen and Louw note the Commissions decisions are not technically binding on state parties, as it issues "recommendations" to state parties, rather than "orders" which are legally binding.⁹⁰ Nevertheless the Commission has been clear that its decisions should be read in line with the general commitments that state have to protect and promote human rights and it is now a widely accepted legal principle that in order to properly fulfil these requirements states should follow the decisions of the Commission.⁹¹ Murray and Long note that the concept of compliance is somewhat difficult to define with respect to the Commission and that sometimes decisions can be complied with over long periods of time.⁹² It should be noted that in the vast majority of decisions made on the merits of an individual petition—decisions made where the Commission has looked at the substance of the case and not ruled on a procedural or technical rule – the decision has gone against the state party.⁹³ Out of these cases there is a compliance rate of around 46% - compliance being defined as where a state complies in full or in part with a decision against them but even then as Viljoen and Louw note these figures are uncertain and the only thing that can be definitively established is that there is a general trend to non-compliance with the Commission's decisions.⁹⁴ Compliance in relation to interim remedies is also relatively weak and notoriously Nigeria ignored an interim order to postpone the execution of the activist Ken Saro-Wiwa.⁹⁵ Whilst there were other factors surrounding the case, as Nigeria was under military rule at the time, it nevertheless is cited as illustrative of the Commissions relative powerlessness.⁹⁶ There are also, as Wachira details, many cases of states simply ignoring

⁹⁰ Viljoen and Lirette Louw 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 AJIL 1.

⁹¹ See *Kenneth Good v Republic of Botswana* Communication 313/05 28th Activity Report (2009).

⁹² Rachel Murray and Debra Long *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (CUP 2015).

⁹³ Viljoen and Louw (n. 90) 2.

⁹⁴ *Ibid.* 12

⁹⁵ *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

⁹⁶ George Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 AHRLJ 465.

judgments and some states such as Eritrea have had multiple decisions against them without even communicating a reply.⁹⁷

Significantly there appears to have been little change with the transformation of the OAU into the AU. The AU's 2000 Constitutive Act prioritises the protection of human rights but does not mention the Commission which has led some authors to conclude that this was an attempt to side-line the organisation.⁹⁸ Whilst it is technically possible for the Pan-African Parliament to order compliance with the Commission in order to resolve contentious cases this power has never been utilised.⁹⁹ Some of the Commission's decisions have influenced domestic legal processes but where this has happened this is much more a reflection of the internal legal systems and local activist forces than it is of the Commission's institutional success.¹⁰⁰ In 2008 the Commission received a significant increase in AU funding which did go some way to rectifying some of the logistical problems it faced in making individuals aware of their rights, monitoring state compliance and administering the various aspects of its work.¹⁰¹

(iii) Interpreting the Commission's "weakness"; Anti-imperialism within pre-emptive and direct opposition to the African Commission

As outlined in chapter one anti-imperialist institutional opposition was characterised by two related assumptions; firstly the sovereignty of postcolonial states was juridically unequal to that of other states and secondly, in part as a consequence of the first assumption, international human rights law posed a distinct threat to the sovereignty of postcolonial states. These assumptions can be seen behind the justifications and explanations of the Commission's weakness even though the Charter was a decolonised human rights instrument. Ideological anti-imperialist opposition, which was outlined in chapter two, contended that the content of international human rights law represented colonial-imperial interests or was a tool for neo-imperialism. As argued in section one of this chapter many of the concerns behind anti-imperialist ideological opposition were addressed by the African Charter's reprioritisation of human rights. However, elements of anti-imperialist ideological opposition persisted in relation to the Commission's capacity to enforce rights. The Commission's weak structures

⁹⁷ Ibid see also Article 19 'Eritrea: ARTICLE 19's submission to the UN Universal Periodic Review' 24 June 2013 available at <http://www.article19.org/resources.php/resource/37120/en/eritrea:-article-19's-submission-to-the-un-universal-periodic-review#sthash.bL9FQDTE.dpuf> accessed 20 Aug 2014.

⁹⁸ See Robert Eno 'The Place of the African Commission in the 'New African Dispensation' (2002) 11 African Security Review 63.

⁹⁹ Wachira (n. 95).

¹⁰⁰ Obiora Okafor *The African Human Rights System: Activist Forces and International Institutions* (CUP 2007) 93-5.

¹⁰¹ Michelo Hansungule African courts and the African Commission on Human and Peoples' Rights available at < http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf> accessed 20 July 2015

described in part one of this section can be read as an act of pre-emptive anti-imperialist opposition and the subsequently high levels of institutional opposition was in part an act of direct anti-imperialist institutional opposition.

There has been some attempt to explain the Commission's comparative weaknesses to other organisations as a virtue, or a reflection of African values which is similar to the arguments of anti-imperialist ideological opposition identified in chapter two. As Amoah noted in his study of the Charter's origins, one of the reasons the drafters of the Charter cited for rejecting the creation of a court was that Africans preferred to settle disputes through negotiation and conciliation rather than through adversarial litigation.¹⁰² A number of other writers noted that at the time of the Commission's formation there was an assumption that a non-adversarial body was in keeping with African values.¹⁰³ There are few concrete details as to who originally advanced this view and its context, yet this view appears to be a defensive-relativist justification for not including a court of human rights into the final Charter. In common with many the relativist arguments in the Asian values debate, detailed in chapter two, this argument appears to be an example of states utilising loosely defined cultural values to justify the existence of an organisation with a weak or non-existent protection mandate. Significantly when at its 22nd Ordinary session the Commission considered legal approaches to the issue of non-compliance with the Commission's decisions the importance of "dialogue" with the recalcitrant state party, rather than legal obligation, was stressed seemingly giving weight to the claim that the Charter had constructed the Commission to have a non-legal approach to enforcement that seemed to follow defensive-relativist assumptions.¹⁰⁴ However the Commission that was eventually created by the Charter was a quasi-judicial body, which specifically envisaged litigation.

An additional dimension to this argument was that some of the rights contained within the Charter, in particular the Right to Development and the Right to a Satisfactory Environment, were arguably rights that did not need a framework for litigation and enforcement. Solidarity rights, such as the Right to Peace and the Right to Development, are founded on what Karl Vasek termed the 'fraternity' of humanity and their realisation often requires collective action

¹⁰² Phillip Amoah 'The African Charter on Human and Peoples Rights: An Effective Weapon for Human Rights?' (1992) 4 AJICL 226.

¹⁰³ Gino Naldi and Konstantinos Magliveras 'The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison' (1996) 8 AJICL 944. See also CRM Dlamini 'Towards a regional Protection of human rights in Africa: The African Charter on Human and Peoples' Rights' (1991) 24 The Comparative and International Law Journal of Southern Africa 189,192-3.

¹⁰⁴ Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach 22ⁿ Session ACHPR 1998 Doc/OS/20 (XXII).

from a variety of actors working together in a common cause.¹⁰⁵ These rights require political solidarity between states for their delivery and the rights holder is the community at large, rather than an individual.¹⁰⁶ At a 1986 conference on the promotion of human rights in Africa, legal experts argued that “the primary impetus” for the promotion of human rights “will have to come from Africans themselves” and they concluded that the creation of networks of solidarity was important to form the basis of “collective self-reliant development.”¹⁰⁷ This misses the point; given that the state controls or has the capacity to control natural resources and the means of production, which underpin these rights, the ability to take action against the state is vital to ensure the realisation and protection of such rights. The first Chairman of the Commission took this view concluding that the Charter had reprioritised the substance of international human rights law to reflect the “struggle for African people” but the Commission was in danger of become a “paper tiger” which weakened the rights contained in the Charter.¹⁰⁸

In terms of institutional opposition, from its inception commentators on the Charter had noted a highly a defensive approach to state sovereignty and that the Commission had limited powers to protect human rights within signatory states. Umozurike writing in 1988 acknowledged the deficiencies of the commission but was optimistic that it could develop a system for adequately protecting human rights.¹⁰⁹ Dlamini argued that the Charter showed that African states are “not unconcerned about the violation of human rights”, but at the same time acknowledged that the uncertainty surrounding the Commissions’ mandate makes “the charter largely ineffective.”¹¹⁰ Other early commentators were less optimistic. At a 1986 symposium entitled “Human Rights in the African Context” held in Port Harcourt Mathews warned that the Commission’s relatively weak powers of scrutiny and enforcement would “allow despotic regimes to continue on their paths of abuse.”¹¹¹ Writing elsewhere in Mathews described the Commission as “disappointing” and noted that there was a danger that the Commissions weaknesses may make signing up to the Charter an “empty gesture.”¹¹²

¹⁰⁵ Carl Wellman ‘Solidarity, the Individual and Human Rights’ (2000) 22HRQ 639,642.

¹⁰⁶ Susan Marks ‘Emerging Human Rights: A New Generation for the 1980s?’ (1981) 33 Rutgers Law Review 435, 441.

¹⁰⁷ John Rusk ‘Africa Rights Monitor: Structures of Neo-Colonialism: The African Context of Human Rights’ (1986) 33 Africa Today 71,76.

¹⁰⁸ Umozurike, ‘The Protection of Human Rights under The Banjul (African) Charter on Human and Peoples' Rights’ (1988) 1 African Journal of International Law 82, 83.

¹⁰⁹ Ibid.

¹¹⁰ CRM Dlamini (n. 101) 201.

¹¹¹ Rusk (n. 105) 72.

¹¹² Mathews (n. 4) 97.

The relatively weak protection mandate of the Commission can be read as an act of pre-emptive anti-imperialist opposition in the following ways.

Firstly there were those who argued that the charters weaknesses reflected actual weaknesses within the sovereignty of African states, mirroring the arguments about the sovereign inequality of postcolonial states outlined in chapter one. Bina Okere makes this point in her early comparative study between the Charter and the ECHR and the Inter American Human Rights Commission, noting that

“African States, still jealous of their newly acquired national sovereignty, have not yet come round to conceding to an international judicial organ [for] the arbitration of human rights questions.”¹¹³

Evelyn Ankumah writing in 1996 makes a similar point although from a slightly different perspective noting that “having fought had to acquire their independence from colonial powers, African States were preoccupied with maintaining their sovereignty.”¹¹⁴ Ankumah argues that this explains the difficulties behind “the promotion and protection of human rights” in the OAU and explains the overall hostility to supranational human rights scrutiny.¹¹⁵ Odinkalu writing in 2003 makes a similar point arguing that it was “early insecurities about the precariousness of their newly won independence” that led African states to an “extreme assertion of sovereignty” which marginalised human rights in inter-state activities until the end of the twentieth century.¹¹⁶ This framed the Commission’s weakness as a direct result of decolonisation and the construction of the postcolonial state. This is an inversion of the anti-imperialist argument outlined in chapter one; in the same way that states opposed international organisations because of their sovereign inequalities stemming from decolonisation, states now constructed an organisation to reflect their sovereign inequalities.

Abdullahi An-Na'im takes this argument further reasoning that it “is unrealistic to expect the postcolonial African State to effectively protect human rights” because the postcolonial state in Africa had been created by colonial rule and therefore was “incapable of creating and sustaining the institutions and processes necessary to protect rights.”¹¹⁷ The logical conclusion of this argument is that any supranational institution created by postcolonial states was likely

¹¹³ Okere (n. 10)

¹¹⁴ Evelyn Ankumah *The African Commission on Human and Peoples' Rights: Practices and Procedures* (Martinus Nijhoff Publishers, 1996) 5.

¹¹⁵ Ibid.

¹¹⁶ Odinkalu (n.19) p.9.

¹¹⁷ A. An-Na'im, 'The legal protection of human rights in Africa: how to do more with less' in A. Sarat and T.R. Kearns (eds.) *Human Rights: Concepts, Contests, Contingencies* (University of Michigan, 2002).

to fail because it would rely on the institutions of the postcolonial nation state to implement its decisions. As Odinkalu observed in a similar vein that “ineffectual national foundations cannot support effective regional supervision.”¹¹⁸ Emmanuel Bello writing at the time of Charter’s drafting argued the Commission was “illusory and unworkable” because it attempted to accommodate all African states and it was better instead, he argued, to attempt to form an organisation between like-minded states, such as those with a common law tradition.¹¹⁹ These explanations are explicit in drawing a link between the weakness of the colonial state and international organisations and in doing so rely on a notion of statehood and juridical sovereignty, central to anti-imperialist thinking.

The second major argument was that states had intentionally created a weak protection regime as means of balancing their hostility to international legal mechanisms with their desire to appear human rights compliant. M’Baye’s thesis is that the Commissions’ weaknesses originated in the Charter because it was “what the African States were able to accept in 1981”.¹²⁰ Viljoen also makes this point noting that the Commission had “clearly been designed to accomplish very little”.¹²¹ He goes on to note that the OAU/AU’s approach to the Commission was “schizophrenic” as they simultaneously praised it for its accomplishments and starved it of resources.¹²² Sindjoun situates this argument in a broader context and concludes that the Commission was effectively mere “window dressing” in order accede to the demands of the international community.¹²³ States have certainly implicitly relied on this interpretation when engaging in acts of institutional opposition; when the Commission found that far reaching executive decrees passed by the military regime in Nigeria constituted a violation of the right to fair trial Nigeria argued that the decision infringed their sovereignty.¹²⁴ The Gambia argued when the Commission ruled on the undemocratic transfer of power and violations of free after a coup in 1995, that the Commission should only concern itself with serious violations of human rights.¹²⁵ Botswana when ordered to pay compensation to an individual who had been wrongly deported the Foreign Affairs Minister, Phandu Skelemani,

¹¹⁸ Odinkalu (n.19) 22.

¹¹⁹ Emmanuel Bello ‘Human Rights: The Rule of Law in Africa’ (1981) 30 ICLQ 628, 634.

¹²⁰ Opp Cite R Sock “The case for an African Court of Human and Peoples’ Rights: from a concept to a draft protocol over 33 years” (March-April 1994) *African Topics* 9

¹²¹ Viljoen (n.59).

¹²² Viljoen (n.59) 297.

¹²³ L Sindjoun ‘La civilisation internationale des murs: éléments pour une sociologie de l’idéologie structurel dans les relations internationale’ (1996) 27 *Etudes internationales* 848 quoted in JD Boukongou ‘The appeal of the African system for protecting human rights’ (2006) 6 *African Human Rights Law Journal* 271.

¹²⁴ Morris Mbondenyi *International Human Rights and their Enforcement in Africa* (Law Africa Publish 2011) 336.

¹²⁵ This argument was advanced in *Jawara v The Gambia* (2000) AHRLR 107.

reject the Commission's decision saying "it does not give orderswe are not going to listen to them."¹²⁶

These examples pointed to the weakness of the Commissions protection mandate being a result of the organisation's rational design. Significantly Botswana was at the time was a democracy with independent courts, unlike the other two examples, meaning that opposition was related to the organisation and not just a reflection of that particular state's attitude to the rule of law. There has also been relatively low rate of compliance when the Commission has issued remedies on the basis of expansively interpreting its powers under the charter to allow it to issue orders relating to compensation or specific far reaching law reform.¹²⁷ Again the compliance in these cases was true of states which were democratic with strong judicial institutions and non-democratic states with weak institutions. When reading this pattern of behaviour in line with the account of the Commission's formation, set out in part one, it is reasonable to conclude that the Commission's protection mandate was intentionally constructed in an anti-imperialist mould – it was designed to protect postcolonial states from the potential effects of a human rights organisation. This original act of pre-emptive institutional opposition explained the acts of direct institutional opposition detailed above. What marked these acts of institutional opposition out as anti-imperialist is that they were based on the assumption that the Commission had been created not to exercise a protection mandate over the postcolonial state. When the Commission exercised its protection mandate it exacerbated sovereign vulnerabilities at the heart of anti-imperialism. For the most part institutional opposition, as Udombana argued, was characterised by "a spirit of furious indifference" from Africa leaders towards the Commission and there are some clear examples of institutional opposition which were non anti-imperialist such as the procedures on annual reporting.¹²⁸ Yet where purposive arguments about the Commission have been made by states they have served to highlight the Commission's pre-emptive anti-imperialist foundations.

(3) Pre-emptive anti-imperialist institutional opposition to The African Court of Human and Peoples Rights

In 1998 the Assembly of Heads of State and Government of the OAU adopted an additional Protocol to the Charter establishing an African Court of Human and Peoples Rights. Whilst the

¹²⁶ Simisani Chilisa 'Botswana will not honour African Union ruling on Prof Good' Sunday Standard 2 August 2010 available at <http://www.sundaystandard.info/article.php?NewsID=8415&GroupID=1> accessed 20 August 2014.

¹²⁷ See Wachira (n. 94) and on the Commission's remedies Sabelo Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 AHRLJ 118.

¹²⁸ Nsongurua J. Udombana 'The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa' (2011) 6 AHRLJ 299, 330.

original draft of the Charter contained no provision for a Court the possibility was open for a Protocol to the Charter on a Court to be adopted and implemented. Even after the passage of the 1998 Protocol it took until 2004 to get the necessary number of state-party signatures for its ratification. It was intended to eventually replace the Commission and it was scheduled to take over the premises of the International Criminal Tribunal for Rwanda in Arusha once the Tribunal's workload wound down, although in its final form the Court was put in a complimentary relationship with the Commission.¹²⁹ In 2009 the Court issued its first judgement dismissing a case for lack of standing against the government of Senegal.¹³⁰ Whilst the judgement was a hearing on matters standing before the court as Charles Jalloh argued, it represented a significant advancement that an independent African court was able to operate and issue judgements on human rights matters.¹³¹

The creation of the Court saw a recurrence of the pre-emptive institutional opposition that was present at the Commission's creation, as states in the OAU moved from initially opposing the idea of a human rights court towards supporting a court with limited rights of standing. Rebecca Wright in her analysis of the Court's formation concludes that this was a form "rational design" as the Court was designed to reflect, and not challenge, state supremacy and state interests.¹³² Rational design theorists were discussed in the introduction and first chapter; they presume that states shape organisations both to reflect shared interests and in anticipation of their future powers and potential.¹³³ Wright's analysis, whilst emphasising the importance of postcolonial sovereignty in relation to the Court's foundation, by virtue of being written in 2006 does not analyse how these concerns affect its operation. Subsequent disputes about the Court's capacity to hear international criminal cases reveal ongoing concerns about its ability to threaten state sovereignty suggesting that states defensive attitude to the Court was a response to its perceived potential rather than its actual powers.

In the early 1990s a series of high level meetings culminated in a draft proposal for an African Court of Human Rights being drawn up in 1994 by a committee of experts convened by the International Commission of Jurists. In 1995 these proposals were the basis of an OAU expert

¹²⁹ S Sceats "Africa's New Human Rights Court: Whistling in the Wind?" *Chatham House Briefing Paper* IL Bo 09/01 (2009)

¹³⁰ *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, Judgment (Afr. Ct. Hum. & Peoples' Rts. Dec. 15, 2009)

¹³¹ Charles Jalloh 'Michelot Yogogombaye v. Republic of Senegal' (2010) 104 AJIL 620, 628.

¹³² Rebecca Wright 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights (2006) 24 Berkley Journal of International Law 463 465.

¹³³ For an overview of rational design theories see Barbara Koremenos et al. The Rational Design of International Institutions in Barbra Koremenos, Charles Lipson and Duncan Snidal (eds) *The Rational Design of International* (CUP 2004) 4-6

meeting convened in Cape Town to discuss the formation of an African Court of Human Rights.¹³⁴ This was a significant step by the OAU as they seemed to be actively contemplating the creation of an institution that had a much stronger protection mandate than the Commission which could litigate against states in order to enforce human rights. Gina Bekker argues that these developments need to be seen in the context of the previous year's Rwandan genocide as "African states wanted to be seen to be doing something tangible" in response.¹³⁵ This is not entirely dissimilar to histories of the European Court of Human Rights that focus on the memory of the holocaust as a spur to its development and the original drafts of a Protocol on the Court used the Inter-American and European human rights systems as a template.¹³⁶ Significantly these early drafts contained a provision which allowed individuals to directly access the Court after their state had ratified the Protocol, in a similar fashion to Protocol 11 of the ECHR which made jurisdiction of Court compulsory after a state joined the Council of Europe.

Bekker and Wright both note when state parties to the Commission were invited to file comments on the proposed Protocol many of them attacked this particular clause. The Gambia worried that individual petitions would encourage "vexatious and embarrassing actions" and the Mauritanian delegate worried that allowing NGOs to use the individual standing provisions would allow them to attack state parties.¹³⁷ Julia Harrington argues that Nigeria's influence on drafting process - which was at the time under the rule of General Abacha and had publically ignored the Commission by executing Ken Saro-Wiwa in defiance of an interim order - may have been decisive in persuading some state parties to reject the individual petition provisions.¹³⁸ There is no direct evidence in support of this hypothesis but the attitude of many of those commenting was quite hostile even though there were some state parties, such as Tanzania, that were strongly in favour of individual petition. At a second OAU meeting of government experts in Nouakchott in 1997 the individual provision was amended to make individual standing optional.

The final text of the Protocol requires states to issue a declaration "accepting the competence of the Court to receive cases" from individuals and NGOs and requires the Court not to receive

¹³⁴ AHG/Res 230 (XXX)

¹³⁵ Gina Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51 *Journal of African Law* 151, 164.

¹³⁶ See chapter five for an overview of these histories.

¹³⁷ Bekker (n.134).

¹³⁸ Julia Harrington 'The African Court on Human and Peoples' Rights' from Evans and Murray (n 70).

such cases where a declaration has not been filed.¹³⁹ This allows two options for individuals and NGOs to access the Court; either the Commission refers their case to the Court – potentially taking a long time – or an individual state enters a declaration allowing individuals access. As of the spring of 2016 seven out of the 24 parties to the Protocol had made such a declaration.¹⁴⁰ This severely limits the Court’s capacity to protect human rights as the case of *Timan v Sudan* illustrates. The applicant was a Sudanese refugee from Darfur living in the DRC and had been expelled from Sudan after being declared an enemy of the Sudanese government. The application was dismissed because the government of Sudan had not filed a declaration allowing individual petitions to the Court.¹⁴¹ As the Sudanese government has remained uncooperative with the Commission and was at the forefront of the AU campaign against the ICC the prospect of it submitting itself to the jurisdiction of the Court was highly unlikely. The rule under Article 34(6) of the Protocol has been used to declare 55% of all of all cases brought by individuals against states inadmissible.¹⁴² In 2013 the Court held that there was no violation of a right to a fair trial when a state chose not to enter an Article 34(6) declaration and that there was no obligation on state parties to make such a declaration.¹⁴³ In March 2016 Rwanda, who had been one of the first states to file an Article 34(6) declaration, withdrew their declaration shortly before a court was due to hear an application from a leading political dissident.¹⁴⁴ Admissibility decisions in relation to declarations under Article 34(6) are a symptom of pre-emptive institutional opposition as the rule was specifically designed by states to limit the Court’s capacity to protect human rights and stifle its ipsetic potential.

The decision by the AU to merge the Court and the African Court of Justice, an AU institution created by the 2000 AU Constitutive Act, can be read as a form of pre-emptive opposition. Whilst the Charter of the new African Court of Justice and Human Rights resolves some of issues of standing in the Protocol, it also represents an attempt by the AU to create a new court which it has greater control over. A merger between the two bodies was first proposed by President Obasanjo of Nigeria in 2004 who thought that the Court of Justice could have a human rights division with competence to hear human rights matters and the AU assembly

¹³⁹ PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS, Art 34(6)

¹⁴⁰ These eight states are Benin, Burkina Faso, Cote d’Ivoire, Ghana, Malawi, Mali, and Tanzania.

¹⁴¹ *Amir Adam Timan v Republic of Sudan* App 005/2012.

¹⁴² This is taken from list of finalised decision of the Court until 2013 available at <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions> accessed 14 August 2014.

¹⁴³ *Femi Falana v. The African Union* (2013) Application No 001/2011.

¹⁴⁴ Oliver Windridge ‘The Folly of Being Comforted: Rwanda withdraws its Article 34(6) Declaration’ The ACTHPR Monitor 7 March 2016 <http://www.acthprmonitor.org/the-folly-of-being-comforted-rwanda-withdraws-its-article-346-declaration/> accessed 12 May 2016.

adopted a formal decision on the merger.¹⁴⁵ Kane and Motala were critical of this decision because it represented an attempt by the assembly override treaty obligations under the Charter and had “serious consequences for the rule of law in Africa.”¹⁴⁶ Although they concluded that were the merger to happen it could potentially strengthen the power of the Court. During the drafting of the Court’s proposed charter in 2006 a general reservation clause was inserted that would allow states to declare that they did not consider themselves bound by aspects of the Court protocol.

The merger proposals were related to proposals to give the Court jurisdiction to try international crimes. The fact that these proposals originated as a response to opposition from AU states towards the ICC and condemnation of what the AU termed the abuse of universal jurisdiction, meant that it was unlikely that these proposals were going to enhance the Court’s protection mandate.¹⁴⁷ The 2010 Assembly of the AU in Kampala adopted a resolution to “empower” the Court “to try international crimes” but at the same session resolutions were also passed urging African states not to cooperate with the ICC and condemning the exercise of universal jurisdiction.¹⁴⁸ Although the AU Constitutive Act committed it to the “condemnation and rejection of impunity” this provision was extremely unclear as it did not clearly state who this applied to and appeared alongside provisions safeguarding “sovereign equality” and prohibiting member states from interference “in the internal affairs” of others.¹⁴⁹ This allowed the AU Assembly in 2011 to pass a resolution that simultaneously reiterated the commitment of the AU to ending impunity but also called for states to respect “the immunity of state officials”.¹⁵⁰ The AU Assembly also issued a series of resolutions urging for deferrals of the ICC’s prosecutions in Kenya and Sudan, opposing the involvement of the ICC in Libya and supporting states ignoring the ICC arrest warrants and allowing indicted individuals to visit their state.¹⁵¹

This pattern of events can be understood as anti-imperialist ideological opposition to the ICC and to European states attempting to assert universal jurisdiction over African leaders. The AU weren’t necessarily averse to international prosecution in theory and in 2010 supported the

¹⁴⁵ Kane and Motala ‘The Creation of a New African Court of Justice and Human Rights’ from Murray and Evans (n 50).

¹⁴⁶ Ibid. p.415.

¹⁴⁷ For commentary see Florian Jeßberger ‘On Behalf of Africa’: towards the Regionalization of Universal Jurisdiction?’ in Gerhard Werle Lovell Fernandez and Moritz Vormbaum (eds) (Editor) *Africa and the International Criminal Court* (T.M.C. Asser Press, 2014) 155, 159.

¹⁴⁸ Assembly/AU/Dec.292(XV) 27 July 2010.

¹⁴⁹ 2000 Constitutive Act of the African Union Art 4 (o), Art 4(a) & (g).

¹⁵⁰ Assembly/AU/Dec.335(XVI) Art 4.

¹⁵¹ See Assembly/AU/Dec.221(XII) 3 Feb 2009 and Assembly/AU/Dec.366(XVII) 1 July 2010.

prosecution of Hissène Habré, the former President of Chad, for Crimes Against Humanity.¹⁵² However at the 2014 AU Summit states voted to prevent the Court from issuing proceedings for international crimes “against any serving African Union Head of State or Government”.¹⁵³ This would only apply after the merger of the two courts and the granting of the jurisdiction to the court to try international crimes. By the beginning of 2015 the direction of travel of the AU was towards the establishment of a tribunal with no protection mandate which would effectively preserve the impunity of heads of government in relation to international criminal charges. This represented the regionalisation of anti-imperialist opposition. Even though the Court had been created outside the imperialist context of international law, the anti-imperialist arguments of weak sovereignty and overly powerful international organisations affected its design. This was accompanied by outright anti-imperialist opposition to human rights organisations exercising their protection mandates against the leaders of postcolonial states.

(4) Direct anti-imperialist institutional opposition: Regional Economic Community Court’s and the protection of human rights

As noted in the introduction to this chapter the three major Regional Economic Communities (RECs) in Africa the Economic Court of West African States (ECOWAS), the East Africa Community (EAC) and the Southern African Development Community (SADC) all have tribunals with a human rights jurisdiction. In all three REC’s the original purpose of the organisation was economic integration and the purpose of the tribunals was to adjudicate on the interpretation of the organisations constituent treaty. Their tribunal’s acquired a human rights jurisdiction by judicial interpretation of their constitutive acts or had the power directly granted to them by an organisational decision. The REC’s courts and tribunals have all faced varying degrees of institutional opposition when trying to protect human rights within states although the level of anti-imperialist institutional opposition has been comparatively less than the anti-imperialist opposition to the Commission and Court.

Between 2007 and 2013 the EAC Court of Justice (EACJ) was able to rule on eight separate human rights matters but has faced some considerable institutional opposition from member’s states who have opposed its ipestic potential. The EACJ had no explicit human rights mandate but has interpreted its powers under Article 27 of the EAC Treaty, which gives

¹⁵² Assembly/AU/Dec.297(XV).

¹⁵³ Beth Van Shank ‘Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier’ Just Security Blog 10 July 2014 available at <http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/> accessed 14 August 2014

them jurisdiction to interpret community values, as giving them the capacity to interpret human rights matters.¹⁵⁴ This was a somewhat wide interpretation of what appeared to be narrowly constructed provisions and the Court's insistence that their role was interpretive did not constrain them from essentially developing a protection mandate. This noted James Gathii, was the judges attempt to escape the EACJ's "initial obscurity" within the EAC and "overcome its severe institutional weaknesses."¹⁵⁵ Whilst this form of judicial activism, Gathi argues, was welcomed by civil society activists it resulted in some hostility from EAC executive and he notes that the EACJ's "expansive jurisprudence has been ... resisted by member states."¹⁵⁶ After a ruling against Kenya a series of amendments to the EAC Treaty were passed by a special summit in 2007 attempting to place severe procedural limitations on the Court.¹⁵⁷ However these were later ruled to be incompatible with the procedures set out in the EAC Treaty and so the reforms were quashed and the EACJ was able to carry hearing human rights cases.¹⁵⁸ Given in 2014 the Court heard a case from Uganda challenging the legality of its anti-homosexuality law and in 2015 heard a case from Burundi challenging far reaching press censorship laws it is remarkable that direct institutional opposition to EACJ has been relatively limited.¹⁵⁹ There is however a low level of compliance with the Court and although judgements can technically be enforced within national legal systems there is little evidence of this had any definitive results.

The dissolution of the SADC Tribunal's human rights jurisdiction was perhaps the most forthright case of anti-imperialist institutional opposition towards the RECs. Article 4 of the 2001 revised SADC Treaty commits member states to a general set of organisational principles which include 'human rights, democracy and the rule of law' and Article 15 of the 2000 SADC Protocol on the operation of the Tribunal allows an applicant to bring an action against a member state if they have "exhausted all available remedies" or are "unable to proceed under

¹⁵⁴ *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref. No. 1 of 2007) [2007] EACJ 3.

¹⁵⁵ James Gathii 'Mission creep or a search for relevance: The East African Court of Justice's Human Rights Strategy' (2013) 24 *Duke Journal of Comparative and International Law* 249, 259.

¹⁵⁶ *Ibid.*

¹⁵⁷ Ally Possi 'The East African Court of Justice Towards Effective Protection of Human Rights in the East African Community' in Armin von Bogdandy and Rudiger Wolfrum (eds) *Max Plank Yearbook of international Law* 2013 (Koninklijke Brill 2013) 14.

¹⁵⁸ *East African Law Society v AG of Kenya* Ref No.3 of 2007.

¹⁵⁹ IGLHRC Press Release 'Uganda's Anti-Homosexuality Act Challenged before the East African Court of Justice' 30 April 2014 available at <http://iglhrc.org/content/ugandas-anti-homosexuality-act-challenged-east-african-court-justice>. MLDI Press Release 'East African Court of Justice to hear Press Law challenge' 27 Jan 2015. <http://www.mediadefence.org/news/east-african-court-justice-hear-press-law-challenge>. accessed 23 July 2015 as are all subsequent links.

their domestic jurisdiction.”¹⁶⁰ These two provisions were read in tandem as giving the Tribunal the power to hear cases from individuals in member states. Yet regardless of the legal merits of this position, the fact that the creation of a SADC human rights court had been explicitly rejected when drafting the 2000 Tribunal Protocol meant that its human rights jurisdiction was built on weak foundations.¹⁶¹ When Zimbabwean farmers who were victims of Robert Mugabe’s land redistribution programme found avenues of redress effectively blocked in their own jurisdiction (the Zimbabwean government went so far as to actually change the Constitution to restrict their rights of appeal) they took their case to the SADC Tribunal. In *Mike Campbell v Zimbabwe* the Tribunal held that the restriction of the claimant’s right to challenge the appropriation of their land constituted an ouster clause and consequently there had been a violation their rights under the African Charter and a breach of the SADC Treaty.¹⁶² The Zimbabwean high court refused to enforce the judgement and when claimants returned to the Tribunal to get a declaration against the government, the Zimbabwean justice minister attempted to claim that they were not bound by the Tribunal’s decision.¹⁶³ The Zimbabwean government the conducted an extensive lobbying exercise to persuade other SADC member states to suspend the Tribunal. At the 2010 SADC heads of government summit, the Tribunal was suspended pending a review of its functions. In 2012 a meeting of law ministers from SADC countries devised an alternate set of proposals for the SADC Tribunal which did not include a human right jurisdiction and these were quickly adopted at the SADC heads of government summit later in the year, effectively terminating the Tribunal’s human rights jurisdiction.

SADC had previously been heavily critical of Robert Mugabe’s regime in Zimbabwe and in 2009 approved a wide-ranging set of administrative measures against Zimbabwe in response to post-election violence and human rights abuses in the country. Fear of the Tribunal’s ipsetic potential was evident in discussions of the Tribunal’s power at SADC’s 2010 summit - Tanzanian President Jakaya Kikwete exclaimed ‘we have created a monster’.¹⁶⁴ Justifying the 2012 decision to terminate the Tribunal’s human rights jurisdiction Namibia’s Minister of Justice Pendukeni Iivula-Ithana, argued that Member States were entitled to “fine-tune

¹⁶⁰ 2001 Amended SADC Treaty Article 5 2(d) and 2000 Protocol on Tribunal and the Rules of Procedure Thereof all SADC & documents referred to are available here <http://www.sadc.int/english/key-documents/>

¹⁶¹ Frederick Cowell ‘The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction’ (2013)13 HRLR 153.

¹⁶² *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2

¹⁶³ As Gauntlett and Jowell note there was no basis in law for this claim; Jeremy Gauntlett and Jeffery Jowell ‘Legal opinion re Zimbabwe and the jurisdiction of the SADC Tribunal’ 3 September 2009 available at <http://www.zimbabwe-democracy-now.com/2009/09/04/legal-opinion-re-zimbabwe-and-the-jurisdiction-of-the-sadc-tribunal/>

¹⁶⁴ Cowell (n. 158).

regional bodies” where states thought it fit and that the Tribunal existed to “serve us [the governments of SADC].”¹⁶⁵ This was an extreme example of institutional opposition as it envisaged eliminating the organisational protection mandate because of its failure to comply with state wishes. This had a distinct anti-imperialist dimension to it as Zimbabwe sought to build solidarity against the Tribunal by using anti-imperialist rhetoric about the dangers of human rights to build up inter-state solidarity against the Tribunal’s human rights jurisdiction.

By contrast the ECOWAS Court of Justice has faced a relatively low level of institutional opposition and no anti-imperialist opposition. The 1975 ECOWAS treaty made no reference to human rights but the revised 1993 treaty recognised the promotion and protection of human and peoples’ rights as one of the organisation’s core principles. Ebobrah in a detailed analysis of the ECOWAS’ human rights commitments casts some doubt as to whether this constitutes a human rights regime.¹⁶⁶ The significant difference between the ECOWAS Court of Justice and the SADC Tribunal is that a 2005 Protocol issued by a summit of ECOWAS Heads of State specifically gave the Court “jurisdiction to determine case of violation of human rights that occur in any Member State”.¹⁶⁷ In 2008 the Court issued its first ruling against a member state when it held that Niger was obliged to take positive legislative measures to prevent its citizens from customary forms of slavery.¹⁶⁸ The Court has subsequently issued a series of judgements, interpreting the African Charter and other international instruments, including a landmark judgement against Nigeria concerning the right to a sustainable environment, demonstrating the Court’s capacity to implement the Charter’s decolonial conception of human rights.¹⁶⁹ However the Gambia, which has had three Court rulings made against it in relation to the imprisonment, torture and murder of anti-government journalists, has refused to implement its rulings.¹⁷⁰ The Gambia’s current government has a long history institutional opposition towards international human rights organisations but their opposition towards the Court is distinct from the anti-imperialist institutional opposition that affected the SADC Tribunal as it does not use arguments based upon sovereign inequality or collective solidarity. It is

¹⁶⁵ Henning Melber ‘Promoting the rule of law: Challenges for South Africa’s policy’ Open Society Foundation for South Africa SAFPI Commentary No.5 available at <http://www.safpi.org/publications/promoting-rule-law-challenges-south-africas-policy>

¹⁶⁶ Solomon T Ebobrah ‘Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice’ (2010) 54 *Journal of African Law* 1.

¹⁶⁷ ECOWAS Supplementary Protocol A/SP.1/01/05

¹⁶⁸ *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008).

¹⁶⁹ *SERAP v Nigeria* (2012) ECW/CCJ/JUD/18/12.

¹⁷⁰ *Manneh v The Gambia* (2008) AHRLR 171, *Saidykhan v Gambia* (2010) ECW/CCJ/APP/11/07 *Deyda Hydara v. The Gambia* (2014) EWC/CCJ/App/30/11.

noteworthy that whilst the Court has condemned Gambia for failing to implement these judgements there are few direct enforcement measures that ECOWAS has taken against it.¹⁷¹

The overall assessment of the ECOWAS Community Court of Justice by Karen Alter *et al.* is broadly positive and they note that states have been willing to tolerate the Court exercising a far wider human rights jurisdiction than the African Court.¹⁷² In part they note this is due to the a series of reforms that allowed civil society groups and other supranational actors to lobby in favour of human rights reforms to be included within the Court's jurisdictional competence rather than, as was the case with the EACJ and the SADC Tribunal, judges interpreting organisational decisions to give the Court a protection mandate. Another reason for the Court's relative success Kufuor argues is its institutional economic framework which prioritises the doctrine of institutionalised ordoliberalism – the idea that the economic institutions should be organised to ensure that the free market and economic integration produces results.¹⁷³ This encouraged states to view the protection of human rights in the context of ensuring greater economic integration, something that was supported by other transnational actors. Both explanations have some merit to them and although initially dogged by a rather low rate of compliance, Alter *et al* note that there is evidence that the Court is able to shape remedies in a manner that has progressively encouraged greater compliance.¹⁷⁴ One potential factor in ensuring a relatively low level of opposition to REC's appears to be that their tribunals often hear a wide range of other commercial and constitutional matters and therefore are not seen solely as a human rights organisation. However, this may not be subject to limitations as Gathii notes in relation to the EAC, whilst the organisations member states were committed to economic integration these commitments were seldom framed in legal terms or in terms of protecting human rights.¹⁷⁵

Conclusion

The African Charter, as the first section of this chapter demonstrated, was a genuinely decolonial human rights instrument as it radically broke with existing conceptions of human rights by using a different epistemic framework and by giving equal status to all forms of rights. However the evolution and practice of the Commission and Court showed that OAU/AU

¹⁷¹ See Committee to Protect Journalists 'ECOWAS court rules Gambia failed to investigate journalist murder' 10 June 2014 available at <https://cpj.org/2014/06/ecowas-court-rules-gambia-failed-to-investigate-jo.php>

¹⁷² Karen Alter, Laurence Helfer and Jacqueline R. McAllister 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 AJIL 737.

¹⁷³ Kofi Kufuor *The Institutional Transformation of the Economic Community of West African States* (Ashgate Publishing, Ltd., 2006) 1-10 and 42-44.

¹⁷⁴ Alter *et al.* (n. 169)

¹⁷⁵ Gathii (n.152) 287-89.

and states within those organisations, engaged in pre-emptive institutional opposition on a vast scale to inhibit the creation of organisations with an effective protection mandate. This opposition was often anti-imperialist as it drew on the notion that postcolonial sovereignty was weak and under threat from international human rights law and occasionally used the anti-imperialist ideological argument that the enforcement of rights was incompatible with the culture of some societies.

There is a line of argument that in general terms attempts to explain anti-imperialist opposition towards regional human rights organisations in terms of the radical incommensurability of human rights with postcolonial states. These explanations in a limited sense can explain why some organisations are likely to have weak protection mandates. As the second section noted there is nearly four decades of scholarship on the African Commission arguing that the postcolonial state was unable to support a supranational human rights regime. However, these explanations above do not give an indication of how over time the situations within states might change and it is noteworthy that democracies as well as non-democracies have engaged in pre-emptive and direct anti-imperialist opposition. As some African scholars have noted democratic states with independent courts are often necessary for human rights enforcement which correlates with the experience of other regional systems.¹⁷⁶ As the fourth section of this Chapter noted there is some evidence of a slightly different attitude towards the protection of human rights in relation to the REC's. Apart from the SADC case, there are much more standard practices of institutional opposition towards these organisations.

Equally explaining human rights problems in terms of state weakness ignores the apparent shift in the politics of human rights as the OAU transitioned into the AU. As Wachira notes the AU had the capacity to impose sanctions and launch military operations to protect human rights, powers which required considerable interstate co-operation and envisaged violating a state's sovereignty.¹⁷⁷ Attitudes towards state sovereignty and the capacity of regional organisations to protect human rights did evolve – it was just that this evolution of attitudes did not necessarily involve the Commission or the Court. Additionally focusing on radical incommensurability and the inherent weakness of the postcolonial state inadvertently falls into the orientalist methodological trap of believing that there exists a class of 'savages' that

¹⁷⁶ Mutua (n 53) and Abiodun Odusote 'Appraisal of the Enforcement of Human Rights in Selected African States' (2014) 19 IOSR Journal Of Humanities And Social Science 52.

¹⁷⁷ Wachira 'African Court on Human and Peoples' Rights: Ten years on and still no justice' MRGI Report (2008) available at <http://www.refworld.org/pdfid/48e4763c2.pdf>.

can never be human rights compliant.¹⁷⁸ The defensive relativist argument, which maintains that adjudication violates collective values and therefore adversarial approaches at the supranational level should be rejected, has been heavily criticised. As Issa Shivji notes these interpretations of collective identity refer to a collective that is defined by the “oppressor state.”¹⁷⁹ The African Charter recognised the rights of communities and groups to maintain their distinct collective existence - it was the postcolonial state that denied these groups their rights and resisted the creation of mechanisms to protect them. Also removing human rights from their imperial context does not necessarily involve eschewing any form of enforcement mechanism. As Jose Manuel-Barreto notes what is necessary for the decolonisation of human rights is “a dialogue with other visions of rights” and he is critical of attempts to completely reject the western tradition of rights.¹⁸⁰ This would include the idea that there are obligations upon the state to protect human rights in line with a basic international legal framework.

In short anti-imperialism as practiced towards regional human rights organisations was not necessarily a feature of the postcolonial state and the decolonisation of a human rights instrument did not involve abandoning human rights organisations with a protection mandate. Rather the common feature underpinning all of the different instances of anti-imperialist opposition in this chapter is hostility to the creation of a protection mandate. This can also be seen in chapter three as anti-imperialist opposition principally coincided with attempts by the UN Commission on Human Rights to develop a limited protection mandate and the reprioritisation of the substance of international human rights law played a relatively marginal role in the activities of the Third World bloc. Protection mandates, by giving the organisation an ipsetic potential, give the organisation an ongoing power to prescribe the content of a state’s laws which as the next chapter argues is inherently imperialist as it depends upon devaluing a state’s external sovereignty. This means that whilst it is possible to decolonise the substance of international human rights law, as this chapter demonstrated, its protection at the supranational level will inevitably have an imperialist dimension.

¹⁷⁸See Makau Mutua ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’ (2001) 42 HILJ 201.

¹⁷⁹Issa Shivji *The Concept of Human Rights in Africa* (African Books Collective 1989) 70-71.

¹⁸⁰ Barreto (n 12) 26.

CHAPTER FIVE

Inherent imperialism and the legal structure of human rights organisations

Introduction

In the introduction to this study a distinction was drawn between the imperialist context of international human rights law's origins and inherent imperialism – the properties of a legal regime that envisage the political dominance of weaker state parties by stronger entities. The imperialist context of international human rights law's origins were discussed in chapter two where it was shown how eighteenth century colonial-imperialism shaped international law's formation and how in the twentieth century early instruments of international human rights law reflected a western European tradition of rights. As the last chapter showed it is possible to remove international human rights law from this imperialist context and the African Charter of Human and Peoples Rights is an example of a decolonial human rights instrument reflecting a distinct set of regional human rights priorities.¹

When postcolonial states grouped together in international organisations in the Third World bloc, anti-imperialism underpinned much of their collective institutional and ideological opposition. As chapter one outlined anti-imperialist institutional opposition was predicated on the notion that postcolonial states' sovereignty was relatively unequal to other states and supranational human rights organisations helped perpetuate these sovereign inequalities. All states engage in some form institutional opposition towards supranational human rights organisations as a means of reasserting their sovereignty against an organisation, but anti-imperialist institutional opposition is a more extreme form of opposition predicated on sovereign weakness. Anti-imperialist ideological opposition, as chapter two outlined, was predicated on the notion that international human rights law was a neo-colonialist tool that needed to be reprioritised to accommodate the needs of postcolonial states. Chapter three examined how anti-imperialist opposition from the Third World bloc within the UN Commission on Human Rights and latterly the UN Human Rights Council was principally a response to both organisations' protection mandates. A protection mandate, as chapter one

¹ Decolonial human rights as defined in chapter four are instruments with a temporal and epistemic separation from human rights formed in the colonial era – see José-Manuel Barreto 'Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto' (2012) 3 Transnational Legal Theory 1.

outlined, is the collection of legal powers that allow an organisation to protect human rights within a sovereign state and ensure compliance with human rights organisations. Even though the African Charter was a decolonised human rights instrument, forms of anti-imperialist opposition persisted against the institutions created to enforce the rights contained in the Charter. This would suggest, as the conclusion of chapter four argued, that anti-imperialist opposition was not just a response to the imperialist context of international human rights law but is a response to the exercise of an organisation's protection mandate.

This chapter examines the causes of anti-imperialist opposition from a different direction arguing that all protection mandates envisage a form of imperialist juridical dominance over a sovereign state. This means that regardless of the origins of the human rights law an organisation applies and regardless of the nature of the organisation (i.e. whether it is a regional or international organisation) organisations with a protection mandate will face anti-imperialist opposition. Protection mandates, this chapter argues, are inherently imperialist and this is a feature of organisational design which triggers anti-imperialist opposition to supranational human rights organisations, regardless of their origins and the decolonised status of the human rights law that they apply.

In the first and second section of this chapter it will be shown how protection mandates give an organisation the legal powers to designate states human rights violators. The notion of universality in international human rights law, section one argues, has historically been defined by a negative universal reference – the concept of universality is defined by defining the existence of an outsider or other. As section two shows the juridical framework of a protection mandate, allows organisations to construct political categories of human rights violating and human rights compliant states and then use these categories to pressure states to change their domestic laws and practices. Whilst this is not directly physically or materially coercive, if a state is identified as a human rights violator this can affect their external sovereign legitimacy. Almost every state in the world is party to at least one international human rights agreement and as chapter one argued compliance with human rights law is a way of demonstrating external sovereign legitimacy.² A protection mandate has the potential to affect a state's claim to what Stephen Krasner termed international legal sovereignty – the right to be recognised as legitimately sovereign by other state powers.³ The categorisation of a state as a human rights violator and the consequences this has for its external sovereignty implicitly justifies the ipseity potential of an organisation. Ipseity according to Jacques Derrida

² Emilie Hafner-Burton *Making Human Rights A Reality* (Princeton University Press, 2013) 5.

³ Stephen Krasner *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) 12.

is a form of power that allows an individual to position themselves as having “the right and the strength to be recognised as sovereign.”⁴ As chapter one argued human rights organisations have an ipsetic potential and in some cases can challenge their member states domestic legal sovereignty – their capacity to make laws and take decisions on behalf of the population. This is because organisation’s exercising their protection mandate are making an authoritative claim as to what the laws of a state ought to be which erodes the traditional sovereign prerogative of lawmaking. This chapter develops this by arguing that organisations justify their ipsetic potential because, when they are exercising their protection mandate, they are attempting to remove states from the category of human rights violating states and move them into the category of human rights compliant states.

Regardless of whether this is successful the fact that a protection mandate attempts to do this, section three argues, is inherently imperialist. The circular nature of the process envisaged by protection mandates – the organisation creates the excluded state, defines universality with reference to the excluded and then attempts to save the excluded state – not only presumes a type of juridical domination over the process of law making in sovereign states, but also mimics the process of colonial-imperialism. Even regional organisations applying decolonized human rights law rely on protection mandates opening them to anti-imperialist opposition. Anti-imperialist opposition persists because of protection mandates and absent a new legal framework for organisations to enforce human rights law the process of protecting human rights at the supranational level will remain inherently imperialist.

As argued in chapter one, states do not join human rights organisations solely for self-interested, or realist reasons but because of a more complex series of rational choices they are socialized into making.⁵ However this is contingent upon states viewing the expected loss of domestic legal sovereignty that is necessary to comply with an organisation’s interpretation of human rights law as fulfilling some broader aim. Where organisations with functioning protection mandates do not face anti-imperialist opposition, and only face institutional opposition of the sort described in chapter one, it is usually because that organisation has established a foundational political narrative that allows states to accept the inherent imperialism of its protection mandate. This allows states to view their potential classification as a human rights abusing state as legitimate and a necessary risk because there is a clear consensus about its necessity. Section four analyses opposition to the European Court of

⁴ Jacques Derrida *The Beast and the Sovereign Volume 1* (Geoffrey Bennington trans, Chicago University Press 2011) 66.

⁵ See Ryan Goodman and David Jinks *Socializing states: Promoting Human Rights Through International Law* (OUP 2013) 34-7 and Jens Ohlin *The Assault on International Law* (OUP 2015) 192-7.

Human Rights (ECtHR) and the Inter-American Court of Human Rights and compares this to the opposition described in the previous two chapters. Anti-colonialism did not establish a foundational political narrative that facilitated states accepting the legitimacy of a protection mandate as it situated formerly colonialist states as the originator of human rights abuses. This in part explains why anti-imperialist opposition is more prominent in some regional organisations than others.

The crucial point that this chapter makes in concluding this entire study is that there are parts of the legal structure of supranational organisations that are responsible for triggering anti-imperialist opposition. The parts of an international organisation that triggers anti-imperialist opposition is found in the organisation's protection mandates. Therefore anti-imperialist opposition, of the sort described in the previous chapters is an inevitable feature of all supranational organisations operation, regardless of whether they are a regional or an international organisation, unless there is a political consensus around the operation of that organisation's protection mandate.

(1) The negative universal reference, international law's universalism and colonial imperialism

Behind the juridical universalism of a human rights instrument, Seyla Benhabib argues, there is a justificatory universalism which seeks to justify the juridical application of rights across all societies.⁶ To understand justificatory universalism it is necessary to distinguish the universal aspiration and the universal realization of human rights. Universal aspiration is the idea that rights *ought* or should be universal. The preamble to the Universal Declaration of Human Rights (UDHR) contains a statement of universal aspiration where it states that human rights are a "common standard of achievement for all peoples and nations".⁷ The justification for this kind of universalism Benhabib argues can be found through a "discourse-theoretic framework" that reasons that all humans ought to have rights because of a "moral universalism" based on "equal respect for the other [human] as a being capable of communicative freedom".⁸ This is a cosmopolitan form of reasoning that is broadly teleological in its declarative statements – it explains the basis for rights being universal without necessarily providing a rationalization or justification for how they can become universal.⁹

⁶ Seyla Benhabib *Dignity in Adversity Human Rights in Troubled Times* (Polity 2011) 11.

⁷ Preamble A/Res 217A (III).

⁸ Ibid Benhabib 64.

⁹ See David Held *Cosmopolitanism: Ideas and Realities* (Polity 2010) 67-70.

Universal realization requires a justification as to why human rights should be enforced in all states. This is different from the fact of an international legal obligation - human rights treaties as a matter of international law bind signatory states. The existence of an obligation is different from the enforcement of an obligation by an external body over a state. Benhabib, whilst acknowledging that international human rights law purports to act as a form of global constitution, does not directly engage with how international law justifies the enforcement of rights in a sovereign state. As chapter one noted juridical instruments that aim to protect human rights by empowering organisations to act against states justify the universal realization of rights with reference to the protection of a victim or victims. This can be seen in Optional Protocol One of the International Covenant on Civil and Political Rights (ICCPR) which refers to “victims” and “violations” of rights as the basis for the Human Rights Committee (HRC) – the ICCPR’s treaty body - exercising its protection mandate over states.¹⁰ The justification for universal realization is constructed by identifying both the violator and victim and using this as a pretext to take action against the violator. Mukau Mutua noted that international human rights law requires the creation of categories of human rights violating “savages” whose “victims” would then be “saved” by the application of human rights law.¹¹ Mutua’s analysis captures how the justificatory universality of an instrument that seeks to realize human rights is to an extent dependent on defining categories of victim and violator. To understand how the justificatory universality of an instrument realising human rights law operates it is first necessary to examine how the justificatory universality of international law is constructed through a negative universal reference.

The negative universal reference was developed by Foucault in his lectures at the Collège De France that form part of *Society must be Defended*. Foucault’s theorisation of sovereignty sought to demonstrate its construction in terms of the “techniques”, “subjugation effects” and “technologies of domination” that gave the sovereign its power.¹² A new discourse appeared, Foucault argued, which constituted the state and the subject of the state into a collective “we” or “I” that spoke in the discourse of “right” and “demanded rights”.¹³ This led to the creation of a form of “state racism” in the eighteenth century as the sovereign defined itself with reference to its biopolitical control and constructed a principle of “national universality”.¹⁴ This universality gave both a structure to the state and constituted the subjects of the state

¹⁰ Preamble, OP 1 ICCPR 999 UNTS 1 1966.

¹¹ Makau Mutua ‘Savages, victims and saviors: The Metaphor of Human Rights’(2001) 42 Harvard Journal of International law 202

¹² Foucault *“Society must be defended”* (David Macey trans Penguin Books 2004) 46.

¹³ Ibid. 49, 52.

¹⁴ Ibid 239.

itself. As Andrew Neal argues Foucault does not see the construction of the state in terms of “milestones on the road to Enlightenment” but rather as “sedimented outcomes of long forgotten and bloody conquest.”¹⁵ The universal power of the sovereign was defined both by the subjects that the sovereign could control and by the subjects that were outside the sovereign’s control. Although Foucault originally focused his analysis on the construction of state sovereignty the concept of a negative universal reference can be applied to the construction of the justificatory universality of juridical mechanisms more generally. During international law’s formative years in the era of colonial imperialism it was the colonial subject that provided the negative universal reference on which the justificatory universality of international law was built. Peter Fitzpatrick, in his analysis of the negative universal reference in Foucault’s work, argues that it is comprised of four fused stages.

The first stage of constructing a negative universal reference is to presuppose a “unity of species” which enables the comparison of the other outside this unified species.¹⁶ This is relatively similar to the construction of an alterity in postcolonial theory where the civilized virtues of colonialism were defined with reference to the colonized.¹⁷ In *Orientalism* Edward Said argued that the process of constructing the orient created a “political vision of reality whose structure promoted the difference between the familiar (Europe, the West us etc.) and the strange (the Orient, the East “them”)”.¹⁸ The construction of the occident and imperial assumptions about universality were, as Emmanuelle Jouannet argues, intertwined with international law’s universalism.¹⁹ The identification of an oriental ‘other’ can be seen in early theories of international law. Writing in 1795 Robert Ward, argued that the Law of Nations only applied to “a particular class of nations.”²⁰ In 1798 Sir James Mackintosh, the Chief Justice of Bombay, argued that international law should only be modified by “the civilized nations of Christendom” and not the “voluptuous savages of Otaheite [or] the meek and servile natives of Hindostan.”²¹

¹⁵ Andrew Neal ‘Cutting Off the King’s Head: Foucault’s *Society Must Be Defended* and the Problem of Sovereignty’ (2004) 29 *Alternatives: Global, Local, Political* 373, 382.

¹⁶ Peter Fitzpatrick ‘Foucault’s Other Law’ in Ben Golder (ed.) *Re-reading Foucault: Law Power, Rights* (Routledge 2013) 50.

¹⁷ Lewis Gordon ‘Problematic People and Epistemic Decolonization: Toward the Postcolonial in African Political Thought’ from Nalini Persram (eds) ‘*Postcolonialism and Political Theory*’ (Lanham MD 2007).

¹⁸ Edward Said *Orientalism* (Penguin 1995) 43.

¹⁹ Emmanuel Jouannet ‘Universalism and Imperialism: The True-False Paradox of International Law?’ (2007) 18 *EJIL* 379.

²⁰ David Armitage *Foundations of Modern International Thought* (CUP 2013) chp.2

²¹ *Ibid.*

The notion of an outsider or 'other' to define universality can also be seen in Alain Badiou's work on the common ethical grounds of human rights.²² Badiou conceives of ethics as being both "an a priori ability to discern evil" and as an adjudication principle to determine the "good" which will intervene against evil.²³ Human rights, Badiou argues, is an "ethical ideology" which is concerned with the production of evil and good subjects, this is not a natural phenomenon as ethics appropriate a "simulacrum of truth" to transform "codes of communication".²⁴ The significant feature of Badiou's thinking is that he identifies how a system of human rights law "strives ... to ward off evil."²⁵ Under Badiou's framework a system of human rights, such as an international human rights organisation, only functions by reference to an external evil which, it identifies and creates. The significance of Badiou's work is that it identifies how an outsider or evil is required to construct the justificatory universalism of an instrument that promotes the universal realisation of human rights.

The second stage of the negative universal reference involves the creation of a system of universal knowledge. In *Truth and Juridical Forms* Foucault argues that knowledge of man "originated in social patterns of control" and goes onto link this to judicial practices and the "manner in which wrongs and responsibilities" are settled.²⁶ The claim to universal knowledge further facilitates the generation of the outside or negative. As Anita Loomba noted colonialism reshaped the "boundaries of human knowledge" and the construction of knowledge of colonised territories "like the functioning of ideology" was able to produce representations and misrepresentations of "reality and its reordering."²⁷ Literary historians, such as Mary Louise Pratt, have noted that travel writings were means of producing "Europe's differentiated conceptions of itself" and creating a "Eurocentered global."²⁸ Colonial era biology and anthropology was also used to enhance colonial power over territories under colonial rule constructing of a universal knowledge governed by colonial powers.²⁹

Marti Koskenniemi details how conferences on the nature of international law in Paris and Berlin in the mid-nineteenth century sought to unify different types of colonial knowledge production to enhance the control of western states over the rest of the earth.³⁰ Writing in

²² Alain Badiou *Ethics An Essay on the Understanding of Evil* (Verso Books 1993) 2

²³ Ibid

²⁴ Ibid 80-83

²⁵ Ibid 91.

²⁶ Michel Foucault *Power: Essential Works of Foucault 1954-1984* (James Faubian tran, Penguin, 1994) 2.

²⁷ Anita Loomba *Colonialism/Postcolonialism: The New Critical Idiom* (Routledge 1998) 57.

²⁸ Mary Louise Pratt *Imperial Eyes: Travel Writing and Transculturation* (2nded Routledge 2003) 5.

²⁹ Laurelyn Whitt *Science, Colonialism and Indigenous Peoples: The Cultural Politics of Law and Knowledge* (CUP 2009) Chp.1.

³⁰ Martti Koskenniemi *Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960* (CUP 2004) 16-18

1880s, around the time of the creation of the Congo Free State Travers Twiss, an international legal theorist, constructed a framework of positivist international law for expanding sovereignty over territories that were otherwise lawless – or outside of European control.³¹ Anthony Pagden traces the history of universal natural rights and notes that the idea of a law of nature was contingent on a form of universal knowledge that explained the seemingly backward state of human society in the Americas and Africa by constructing an “account of the origins of human society” which saw humanity embarking on a “historical process leading inexorably towards a higher good.”³² Even less teleological accounts of human society, such as the “state of nature narratives” of Thomas Hobbes and John Locke, Pagden argues, were contingent upon offering a “counterfactual” account of “human history” which situated the west as where a society advanced towards from its uncivilized condition.³³

The third stage of the negative universal reference is the obverse of the second, as the universal has to make a claim to include the excluded into the universal.³⁴ In later writings Foucault identified this as a component of disciplinary regimes more generally which he argued identified a “culprit” which was both part of the “[disciplinary] code and at the same time outside the code” and eventually offered “the possible transformation of individuals.”³⁵ Postcolonial theorists have observed that the idea of including the other was essential to the civilising mission of colonial imperialism. Michael Adas notes that the civilizing mission of the European powers in the nineteenth century was a retrospective justification for imperial conquest aiming to “uplift” the “savage peoples” to the universal good of western societies.³⁶ French colonialism described this policy as *mission civilisatrice*, and it depended upon the “fundamental assumptions of the superiority of French culture.”³⁷ In the late colonial era Michael Mann noted that colonial literature represented western civilization in the form of the “confident...Oriental, which has successfully adapted the moral and material values of the civilizing mission.”³⁸

³¹ Travers Twiss ‘An International Protectorate in the Congo River’ (1883) 9 *The Law Magazine and Review* 1-20.

³² Anthony Pagden ‘Human Rights, Natural Rights and Europe’s Imperial Legacy’ (2003) 31 *Political Theory* 171, 180.

³³ *Ibid* 181.

³⁴ Fitzpatrick (n. 16)

³⁵ Foucault *Security Territory Population: Lectures at the College de France* (Graham Burchill tr, Palgrave Macmillan 2009) 5.

³⁶ Michael Adas ‘Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission’ in Christopher Lee (eds.) *Making a World After Empire: The Bandung Moment and Its Political Afterlives* (Ohio University Press 2010) 69.

³⁷ Michael Mann ‘Torchbearers Upon the Path of Progress’: Britain’s Ideology of a ‘Moral and Material Progress’ in India’ in Harald Fischer-Tiné and Michaela Mann (eds.) *Colonialism as Civilizing Mission: Cultural Ideology in British India* (Anthem Press 2004) 4.

³⁸ *Ibid*. 3

The concept of guiding the non-civilized other towards progress or reform can be seen in the structure of the League of Nations Covenant which states that “colonies and territories” were to be developed under “a sacred trust of civilisation.”³⁹ In 1945 League of Nations mandate territories were transferred to the United Nations who continued to support the stated purpose of the mandate in ensuring the “well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world.”⁴⁰ Mutua argued that this attitude continued into international human rights law which remained premised “on the transformation by Western cultures of non-Western cultures into a Eurocentric prototype.”⁴¹ Judith Grbich takes this further arguing that international law has a “messianic” complex which leads to “the sight of other peoples’ sufferings” confirming the “logic of the Western self as ‘entitlement.’”⁴² Human rights and the structure of international human rights law, Grbich argues operates to save individuals from their suffering. This stage of the negative universal reference helps explain one of the paradoxes of international law as it marginalises the colonised other whilst simultaneously promising their salvation. Sophie Bessis identifies this tension in the enlightenment values purportedly advanced in the colonial-imperial project, which promised a form of emancipation whilst practicing a form of enslavement.⁴³

This is also seen in the fourth stage of the negative universal reference which complements the third stage. Now with its ability to “enter the universal” the excluded or outsider in Fitzpatrick’s words now “resides permanently within the bearers of the universal.”⁴⁴ The universal has to include the excluded and define the very nature of the excluded other. What Carl Schmitt termed the nomos of colonialism originally undertook this project as it defined the territorial globe with reference to a form of universal order which categorised territories into nations and non-nations.⁴⁵ By undertaking this territorial demarcation international law had become universalised as even the areas that it did not reach were now in effect classified by international law. Emmanuel Jouannet in his commentary on Emer de Vattel’s 1758 work the *Law of Nations* argues that international law originally had a “Welfarist purpose” which aimed to establish a “positive conception of the good and perfectible life for all peoples” and

³⁹ Art.9 The Covenant of the League of Nations 1919 225 Parry 125.

⁴⁰ John Dugard *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (UN California Press 1978) 89.

⁴¹ Mutua (n 11).

⁴² Judith Grbich ‘Secrets of the fetish in international law’s messianism’ from Anne Orford (eds.) *International Law and its Others* (CUP 2009)198.

⁴³ Sophie Bessis *Western Supremacy: The Triumph of an Idea* (Zed Books, 2003) 22- 42.

⁴⁴ Fitzpatrick (n 16).

⁴⁵ Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (GL Ulmen trans, Telos Press 2003) 77-79.

justified intervention in states deemed less civilized by European nations.⁴⁶ Attempts to codify international law in the 19th Century with the creation of the *Institut de droit international* in 1873 were premised upon the construction of a system of civilized universalism which would in Koskenniemi's words advocate for "European peace and progress" and enable the "transformation of "Oriental" nations in the image of European modernity."⁴⁷ This has its modern counterpart in the structure of good governance programmes in international organisations such as the World Bank which specifically set out to link economic aid to improvements in a country's human rights policies.⁴⁸ The World Bank's Good Governance programme links development assistance to the promotion of the rule of law and human rights, and Stephen Humphreys work shows the connection between this and the process of colonisation.⁴⁹ The idea of universality is completed by this fourth stage as it shows how the universal shapes both the subjects it includes and excludes.

What the above shows is how the justificatory universalism of international law was originally created by using the colonised subject as a negative universal reference. The justificatory universalism of organizational protection mandates, the next section argues, is created by using the idea of a human rights violating state as a negative universal reference.

(2) The negative universal reference in the legal structure of human rights organisation's protection mandates

Most human rights organisations lack the power to directly apply coercive measures against states. Although protection mandates give organisations legal authority to scrutinise or even rule upon the status of domestic laws, these powers cannot compel a state to comply with the organisation. The different gradations of protection mandate identified by Laurence Helfer and Anne-Marie Slaughter are a description of the relative organisational powers of scrutiny over a state's laws not a description of powers of compulsion.⁵⁰ Eric Posner summarising the empirical literature on why states ratify treaties that lead to organizational membership, argues that the most plausible reason why states ratify these treaties is "the symbolic

⁴⁶ Emmanuel Jouannet *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP 2012) 67-7

⁴⁷ Martti Koskenniemi 'Nationalism, Universalism, Empire: International Law in 1871 and 1919.' Draft document. "Whose International Community" (2005) p.7
<<http://www.helsinki.fi/eci/Publications/Koskenniemi/Columbia%200405.pdf>> accessed 7 July 2015.

⁴⁸ Olav Stokke 'Aid and Political Conditionality: Core Issues and State of the Art' from Stokke *Aid and Political Conditionality* (Routledge 2006).

⁴⁹ Stephen Humphreys *The Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (CUP 2010) 120, 131 -148.

⁵⁰ Laurence Helfer and Ann-Marie Slaughter 'Toward a Theory of Effective Supranational Adjudication'(1997) 107 *The Yale Law Journal* 273.

importance of looking like a good global citizen”.⁵¹ Posner acknowledges that organisations are given few formal legal powers to provide an “effective system of enforcement” for international human rights law but also acknowledges that there is an overall hope that “positive pressure on human rights violators” will have some effect.⁵² It is this positive pressure, or more specifically the expectation that states ought to be human rights compliant, that actually gives a protection mandate force. However in order for this to have any effect at all a supranational organisation needs to be able to categorise a state as a human rights violating state.

A human rights violating state is shorthand for a state that doesn’t comply with the terms of international human rights law as defined by a supranational human rights organisation. The idea of a rogue state or a state outside international law is, as Jacques Derrida argues, intrinsic to the structure of international law.⁵³ International law Derrida argues, envisages, “the creation of an international juridico-political space” that aims to limit the sovereignty of nation states by reference to the ideal of human rights.⁵⁴ The rogue state is like a beast “whose behaviour appears deviant or perverse” and threatens the entire like-minded community of states.⁵⁵ Crucially Derrida notes the categorisation as a rogue is “a mark of infamy” which actively discriminates against states by “first banishing or exclusion” of a state which can lead to its “bringing before the law”.⁵⁶ As detailed in chapter one external sovereignty, the recognition of a state as externally sovereign in international law (what Krasner calls international legal sovereignty) requires the notional respect of human rights which at least requires making a notional commitment to international human rights law.⁵⁷ Slavoj Žižek observed in the early 1990s that the “triumphant liberal-democratic ‘new world order’” was marked by the separation of states into those “to whom the rules of human rights [apply]” and the “excluded” who go onto become “the main concern of the ‘developed’”.⁵⁸ Within international politics human rights are characterised by attempts to civilize the excluded state in a manner that follows the framework of the negative universal reference outlined above. What protection mandates aim to do is harness these political forces to generate compliance

⁵¹ Eric Posner *The Twilight of Human Rights Law* (OUP 2014) 66. Some of the literature discussed by Posner is also discussed in chapter one.

⁵² Ibid. 103-6.

⁵³ Jacques Derrida *Rogues: Two Essays on Reason* (Stanford University Press trans. , Pascale-Anne Brault and Michael Naas 2005)

⁵⁴ Derrida ‘The Last of the Rogue States: The “Democracy to Come,” Opening in Two Turns’ (2004) 103 *The South Atlantic Quarterly* 323, 332.

⁵⁵ Ibid 328.

⁵⁶ Ibid. 329

⁵⁷ Krasner (n 3).

⁵⁸ Slavoj Žižek ‘Eastern European Liberalism and its Borderlines’ (1992) 14 *Oxford Literary Review* 25, 34.

with the decisions of human rights organisations. It is important to understand that the human rights violating state not only serves as a practical tool to enable a human rights organisations protection mandate to function but it enables the organisation to define itself as the bearer of universal rights.

Almost all countries have signed up to at least one human rights instrument and have as a consequence notionally agreed to have their human rights record scrutinised by an international organisation.⁵⁹ Several different studies have identified the process of acculturation creating incentives for states through the process of mutual interactions with other states, to become members of supranational human rights organisations.⁶⁰ Given this the categorisation of a state as a human rights abuser is a mechanism for banishing or excluding the state from the community of human rights compliant states, in the manner described by Derrida above. In the same way that the existence of a rogue state is necessary to bring a state before the law, the existence of a human rights violating state is essential to justify the ipsetic potential of a human rights organisation. Thomas Risse and Kathryn Sikkink in their description of the spiral model of human rights change, argue that the “normative process of shaming” a state and the “relegation [of a state] to an out-group” is an important mechanism for making a state question its “legitimacy” and potentially make them “willing to make human rights concessions.”⁶¹ James Lebovic and Erik Voeten in their study of shame politics in international organisations note that shaming practices and the expulsion of a state to the out-group can have a series of direct political and economic consequences on that state leading to domestic legal changes.⁶² Ryan Goodman and David Jinks note that stigma is important for international human rights law’s coercive effect especially in a “highly institutionalized environment”.⁶³ Douglass Cassel notes that shaming is a crucial factor for encouraging compliance to international human rights law by both creating an increased expectation of compliance and a “stigma” upon non-compliant states.⁶⁴ What all of these different arguments identify is that shaming a state has an effect on state compliance with human rights law.

⁵⁹ Hafner-Burton (n. 2).

⁶⁰ For an overview see Ryan Goodman and Derek Jinks *Socializing States: promoting Human Rights Through International Law* (OUP 2013) 37-42.

⁶¹ Thomas Risse and Kathryn Sikkink ‘The socialization of international human rights norms into domestic practices: introduction’ from Thomas Risse, Stephen Ropp and Kathryn Sikkink *The Power of human Rights: International Norms and Domestic Change* (CUP 2001) 27.

⁶² James Lebovic and Erik Voeten ‘The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR’ (2006) 50 *International Studies Quarterly* 861, 868.

⁶³ Goodman and Jinks ‘How to influence states: socialization and international human rights law’ (2004) 54 *Duke Law Journal* 621, 632.

⁶⁴ Douglass Cassel ‘Does international human rights law make a difference’ (2001) 2 *Chicago Journal of International Law* 121.

Whilst the formal legal powers that human rights organisations have over states are relatively weak, the effect of relegating a state to an out-group is a way of delegitimizing their external sovereignty. Interaction between states is based on an “organic solidarity” between different state entities, Santiago Villalpando argues, and this solidarity is shaped by the acknowledgement of common values.⁶⁵ When a state is categorised as a human rights violating state that state is seen as acting contrary to those common values and as a consequence their stigmatisation is justified. Oona Hathaway describes this process in terms of an organisation generating “collateral consequences” and directly links an organisations efficacy to its ability to create collateral consequences for states.⁶⁶ By triggering a process of shaming within the confines of its legal framework, an organisation can harness the general normative expectation that states ought to be human rights compliant, to pressure it into compliance with the organisations decision.

However this goes further than just stigmatising a state as the presence of an outsider or rogue state defines the universality of human rights law, by implicitly creating a subject of state which is compliant with the law (the human rights compliant state) and a category of state that has to be brought before the law (the human rights violating state). The human rights violating state is thus outside the law but is expected to be brought within the law in order to reduce or eliminate the shame or stigma of being in the ‘out-group’ of states. Occasionally a state may accept the consequences of being in the out-group of states but even their presence in the out-group is an indication of how human rights organisations use the negative universal reference of the human rights violating state in their protection mandates. The political process of shaming enables protection mandates to function but also by placing the organisation either as a conduit or instigator of the process of shaming means the universalism of a human rights regime is demarcated and defined. The justificatory universality of a protection mandate is therefore defined with reference to the human rights violating state.

Even though states have signed up to international human rights instruments, and therefore notionally consented to belong to the in-group of states, as argued in chapter one and noted above, there is a strong expectation that external sovereignty involves acceptance of the norms of international human rights law. The desire to appear human rights compliant allows the organization to harness this normative expectation within the juridical structure of a

⁶⁵ Santiago Villalpando ‘The legal dimension of the international community: how community interests are protected in international law’ (2010) 21 EJIL 387, 391.

⁶⁶ Oona Hathaway ‘Between Power and Principle’ from Donald Earl Childless (eds) *The Role of Ethics in International Law* (CUP 2012) 71.

protection mandate to encourage compliance which in turn justifies its ipsetic potential. The organisation's claim to proscribe the content of a state's laws becomes authoritative because it is an attempt to prevent that state falling into the category of human rights violating states. The existence of the category of human rights violating states justifies the seemingly expansionary nature of the legal powers contained in a protection mandate described in chapter one. Whilst compliance with a protection mandate involves a state recognizing the organisation as a source of authority over their laws and as a consequence weakening their domestic legal sovereignty it prevents that state becoming a human rights violating state and suffering a reduction of international legal sovereignty.⁶⁷

It will be shown in the next section of this chapter why this process is inherently imperialist but first it is necessary to analyse how the negative universal referent presents itself within the structure of protection mandates by looking at some examples of protection mandates which have already been discussed in the preceding chapters of this study.

(i) *UN based institutions*

The UN Charter's references to the protection of human rights are somewhat opaque. Because Article 2(7) precludes matters "essentially within the domestic jurisdiction" of states being the subject of the UN's attention, this would indicate that Article 6, which allows the expulsion of states that have "persistently violated" the terms of the UN charter is limited in scope.⁶⁸ As Alison Duxbury notes, membership of the UN rarely was dictated by compliance with human rights standards.⁶⁹ Whilst outlaw states are envisaged in the Charter - Article 5 allows for UN action against recalcitrant states - the instigation of these powers is political not juridical. The distinction between political and legal classification of a human rights violator is whether the organisational process of classifying a state as a human rights violator are initiated by the bureaucratic institutions of an organisation, by a legalistic procedure (receiving petitions etc.) or by political procedures which involve the votes of state parties to that organisation.

This explains the significance of the 1503 procedure at the UN Commission on Human Rights, outlined in chapter three, as it created a legal mechanism for identifying a human rights violating state. The Commission's original role was promotional and was intended to advance knowledge about the standards of human rights, not to operate a protection mandate. The 1503 procedure empowered the Sub-Commission on Prevention of Discrimination and

⁶⁷ For a definition of these terms in more depth see chapter 1 and Krasner (n. 57).

⁶⁸ 1945 Charter of the United Nations 892 UNTS 119.

⁶⁹ Alison Duxbury *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2011)

Protection of Minorities to consider “particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights” with a view to referring these situations to the full Commission.⁷⁰ The Sub-Commission was an expert body which under the resolution was tasked with establishing the facts about human rights violations– fulfilling the first and second stage of the negative universal reference concerned with establishing a universal knowledge and demarcating the abnormal. The resolution goes on to describe how the Commission should “strive for friendly solutions” and empowered the Commission to issue such “observations and suggestions as it may deem appropriate” to address a state’s human rights violations.⁷¹ Actions taken by the Commission could include steps such as appointing a special rapporteur, as happened in the Equatorial Guinea case, to make recommendations about “the full restoration of human rights and fundamental freedoms.”⁷² This was an illustration of how the organisation could take steps to make a state human rights compliant, fulfilling the third and fourth steps of the negative universal reference by bringing it into the community of human rights compliant states. Whilst the 1503 procedure was weaker than other organisation’s protection mandates, it utilises the framework of the negative universal reference to construct its justificatory universalism. The UN Human Rights Council has a relatively similar framework under Council resolution 5/1 which allows the Working Group on Communications at the Council to receive and process complaints with a view to reporting “on consistent patterns of gross and reliably attested violations of human rights” allowing it “to make recommendations to the Council.”⁷³ The Council then has at its disposal a series of measures, including ones that were similar to Commission, designed to make a state human rights compliant.

Both the Commission and Council were political bodies as their processes and procedures were governed by state delegates acting in a representative capacity. Under Helfer and Marie-Slaughter’s categorisation of organisations by their protection mandates judicial-review type organisations or treaty review bodies have more powerful protection mandates than the Commission and Council.⁷⁴ Unlike political organisations, Yuval Shany argues, judicial-review type organisations and treaty bodies’ benefit from the “legitimacy capital” associated with courts more generally as their quasi-judicial procedures mean they are associated with norms

⁷⁰ ECOSOC Res. 1503(XLVIII) of 27 May 1970, Art. 5.

⁷¹ Ibid. Art.7 (d) and (e).

⁷² ME Tardu ‘United Nations Response to Gross Violations of Human Rights: The 1503 Procedure Symposium International Human Rights’ (1980) 20 Santa Clara Law Review 559, 577.

⁷³ ‘Institution-building of the United Nations Human Rights Council’ HRC Res 5/1 18 June 2007.

⁷⁴ See chapter one and Helfer and Slaughter (n 50).

such as “fairness, justice, equality before the law [and] legal professionalism”.⁷⁵ This means, as illustrated below, that they have greater freedom than political organisations to place a state party into the category of human rights violating states as their mechanisms are not subject to the political stances or policies of individual states.

(ii) *The European Court of Human Rights (ECtHR) and regional bodies*

It is worth focusing on the ECtHR because it has often served as a template for other regional and sub-regional bodies. Towards the end of this section the African Commission is also assessed and the Inter-American Human Rights Court is considered in the concluding section of this chapter. The European Convention on Human Rights (ECHR) specifically envisages the juridical classification of a state as a human rights violator. Article 34 of the ECHR allows the ECtHR to hear cases from individual alleged victims “of a violation by one of the High Contracting Parties” and requires state parties not to “not to hinder in any way the effective exercise of this right.”⁷⁶ This allows the ECtHR to independently control the categorisation of states as human rights violators. Since 1998 membership of the Court and access to individual petition has been mandatory for the member states of the Council of Europe which has meant that not only has the number of petitions to the Court increased but the autonomous power it has to execute judgements under the ECHR has also increased.

The first stage of the negative universal reference, which requires the unity of the species to be defined, can be seen in the text of the preamble which states that member states share a common “profound belief” in human rights and this is the basis of “greater unity” amongst the Council of Europe.⁷⁷ Winston Churchill addressing the Consultative Assembly of the Council of Europe in 1949 stated that a future human rights court should be able to bring the “judgement of the civilised world” to bear upon states “in our own body of twelve nations” that were committing human rights violations.⁷⁸ Churchill’s speech specifically envisaged the creation of an outlaw state, with the Court acting independently from the political will of states. The second stage, which requires a universal knowledge, is a little more difficult to see directly in the text but when reading Article 32 asserting jurisdiction of the Court over “all matters concerning the interpretation and application” of the ECHR in tandem with other

⁷⁵ Yuval Shany *Assessing the Effectiveness of International Courts* (OUP 2014) 147.

⁷⁶ 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ETS No.5 (ECHR), Art 34.

⁷⁷ Ibid. Preamble.

⁷⁸ Sixth Sitting of the Consultative Assembly 17th August 1949 in *Collected Edition of the Travaux Préparatoires Vol.1* (Martinus Nijhoff 1975) 34.

provisions it becomes clear that the Court was meant to act as the ultimate authority over rights protection in the Council of Europe.⁷⁹

The third stage of the negative universal reference, which requires the universal to bring in the excluded, can be seen in the sections on remedies. Whilst Article 39 gives the ECtHR power to encourage the friendly settlement of disputes, the merger of the ECtHR and the European Commission of Human Rights in the 1990s has made its dispute resolution function much less important.⁸⁰ Provisions relating to remedies and enforcement are now much more important for the Court's operation and these provisions explicitly envisage the Court creating a human rights violating state. Article 41 allows the Court in cases where "the internal law of the High Contracting Party...allows only partial reparation" to award "just satisfaction to the claimant" which vests considerable power in the hands of the Court to decide awards of compensation and rule on the merits of a member states' legal and administrative systems.⁸¹ Equally Article 46, which contains provisions on the execution of judgments, bestows considerable power on the Court and explicitly envisages recalcitrant states, both as the subject of the Court's power and as a justification for its power. The fourth and final stage, where the anti-universal lies permanently in the universal, is not explicitly referenced in the text but the ECHR's *Travaux Préparatoires* make it clear that the Court was created specifically to act against human rights violating states. Speaking in 1949 the Greek delegate to the Consultative Assembly of the Council of Europe (which was about to start drafting the ECHR) warned that there was a permanent threat to European societies from "Caeserism, Nazism, Fascism [and] Communism" and the Council of Europe needed to create an "active instrument for the defence of human rights" in order to safeguard against this threat.⁸² At the same meeting the Italian delegate noted that the protection of human rights depended upon the Court enforcing human rights and democratic states collectively "taking joint responsibility" to enforce human rights and ended his address with a warning that states should not "remain indifferent in face of memories of such a recent past."⁸³

The African Commission, as the previous chapter argued, had a much less clear protection mandate. Article 45 of the Charter states that Commission's function is to "ensure the protection" of rights and "interpret all the provisions" of the Charter which does not clearly

⁷⁹ Art. 34(1), ECHR (n 76).

⁸⁰ Philip Leach *Taking a Case to the Europe Court of Human Rights* (OUP 2011) 74.

⁸¹ This power has been criticised by review group from the Council of Europe - Alistair Mowbury 'Faltering Steps on the Path to Reform of the Strasbourg Enforcement System' (2006) 7 HRLR 609.

⁸² *Collected Edition of the Travaux Préparatoires* (n. 77) 56.

⁸³ *Ibid.* 64

define the existence of the out and in-group of states, in the way described above.⁸⁴ This was in part because the Commission was intended to be a deliberative body to assist the diplomatic resolution of situations rather than an adversarial or inquisitive body with an overt protection mandate.⁸⁵ The procedure contained in Article 55 allows the Commission to receive “other communications” which has allowed it to receive individual communications and it progressively developed its own rules on standing. Article 58 comes closest to outlining a protection mandate and identifying the human rights abusing state where it refers to the identification of “series of serious or massive violations” by state parties.⁸⁶ The Charter is however silent on the third and fourth stages of the negative universal reference. This has been an area where the Commission has interpreted its powers in the broadest possible manner – in a 1995 statement the Commission argued that the communications procedures was “necessarily adversarial” and that it existed to remedy “some act or neglect of a government” that created human rights violations.⁸⁷ This defined the human rights abusing state as a justification for the Commission’s ipseius power. The Commission’s capacity to issue remedies, fulfilling the third and fourth stage of the negative universal reference, was entirely dependent on its own decisions which led to it constructing a protection mandate in part through its own jurisprudence.

(iii) Treaty Bodies

For sake of brevity only three out of the six treaty bodies with individual petition mechanisms are analysed here but these three treaty bodies, which both receive state reports and hear individual complaints, all have similar frameworks to their protection mandates.

The HRC is the Treaty Review body of the ICCPR and under Protocol 1 state parties are required to follow the HRC’s decisions and like the ECHR it specifically refers to “victims of a violation by [a] State Party.”⁸⁸ Whilst the language of violations is explicitly used this is the only reference to the capacity of the HRC to designate a state as a human rights violator.⁸⁹ The only meaningful sanctions afterwards are that the Committee includes a report about the case in a summary of its annual activities. In General Comment 33, where the HRC outlined the obligations of state parties under Protocol 1, the HRC specifically acknowledged that states

⁸⁴ 1981 African Charter of Human and Peoples Rights OAU Doc. CAB/LEG/67/3, Art. 45(2) and (3).

⁸⁵ See Bina Okere ‘The Protection of Human Rights in Africa and the African Charter of Human and People’s Rights: A Comparative Analysis with the European and American Systems’ (1984) 6 HRQ 141.

⁸⁶ Art 58 African Charter (n 84).

⁸⁷ Account of Internal Legislation of Nigeria and the Dispositions of the Charter of the African Human and Peoples Rights’ Second Extraordinary Session, Kampala 18-19 December 1995 DOC II/ES/ACHPR/4.

⁸⁸ Article 1, Optional Protocol 1 (n 10).

⁸⁹ Ibid

“do not always respect their obligation[s]” and refuse to comply with the HRC’s findings.⁹⁰ Even though the exact legal power of the HRC to compel states to follow its rulings is somewhat opaque under the terms of the document – it describes HRC decisions as “views” whilst at the same time stating that they possessed “some important characteristics of a judicial decision” - the General Comment specifically envisages the existence of human rights violating states.⁹¹ One crucial feature of the HRC since 1997 has been the appointment of a Special Rapporteur for the Follow-Up of Views. The reports of the Special Rapporteur are specifically designed to designate states human rights abusers and publically shame the offending state for failing to comply with procedures. The 2011 report of the Special Rapporteur noted 37 countries where “further action” by the HRC was needed, named 13 countries where further information about their human rights situation was required and noted that in the case of applications from Algeria and the Democratic Republic of Congo there was a need for “follow-up dialogue to be ongoing”.⁹² Later in the session, the HRC also condemned Uzbekistan for “unjustified restriction of freedom of movement to torture and death”.⁹³ The gradated naming and singling out of states is indicative of how the organisation creates a universal knowledge with reference to the human rights violating other. When the HRC refers to previous or past decisions or treats them as precedents what it is doing is constructing a system of knowledge about how the ICCPR is to be applied which is constructed with reference to the states that fail to comply with the HRC’s findings.

A similar formulation can be seen in the Optional Protocol to the International Covenant of Economic Social and Cultural Rights (ICESCR). The ICESCR has a weaker framework than the ICCPR - Article 2 of the ICESCR commits states to “achieving progressively” economic and social rights – and this is also reflected in its provisions on state reporting. Under Article 17 states “may indicate factors and difficulties affecting the degree of fulfilment of obligations” under the ICESCR, indicating that state reports were not designed to give rise to the consideration of violations and other obligations on state reporting are similarly weakly phrased, aimed at promoting a dialogue on implementation rather than identifying violations.⁹⁴ These, and other provisions of the ICESCR relating to enforcement, had long been cited as the reason why economic and social rights were either not taken seriously or

⁹⁰ ‘The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ CCPR/C/GC/33 5 November 2008, para 10.

⁹¹ Ibid para 11.

⁹² HR/CT/736 30 March 2011

⁹³ Ibid.

⁹⁴ 1966 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3.

effectively promoted.⁹⁵ Partly because of this the Committee on Economic and Social Rights (the ICESCR's review body) spent many years been investigating the creation of an individual petition mechanism and in 2004 the UN Commission on Human Rights created a working group to draft an optional protocol on individual petition. The Optional Protocol clearly envisages a human rights violating state by envisaging "victims of a violation of any of the economic, social and cultural rights" who are at a "clear disadvantage" as a result of state action.⁹⁶ The remainder of the protocol sets out, in an identical fashion to the ICCPR's Optional Protocol, mechanisms for ensuring state compliance. Whereas the ICCPR's Optional Protocol evolved alongside the treaty itself the ICESCR's Optional Protocol emerged as a response to calls for these rights to be better implemented. Although some scholars doubt whether a violations model is necessarily the most effective model in this respect it is often associated with the realisation of rights within states.⁹⁷

Significantly there appears to be a distinct association between the violations based model of a protection mandate and an organisation being considered effective. In the debates over the UN Commission on Human Rights' powers and the powers of the African Commission, described in chapters three and four, there was a distinct link drawn between an organisation being able to recognise violations and the universal realisation of human rights. This creates something of a paradox, for which international human rights law has yet to devise a satisfactory answer. On the one hand the protection of rights seems to be enhanced by the creation of more court like entities with stronger protection mandates conforming to the judicial-review-type model.⁹⁸ Samuel Moyn notes that international courts emerged as an "oasis" in human rights law because the fight for rights and equality had become focused on "litigating past crime" and rather than explore new mechanisms aimed at tackling the "unfair divisions of wealth and power" activists sought to expand existing notions and institutions in international law.⁹⁹ Yet, as the previous two chapters identified, these organisations often possess the strongest protection mandates and seem to trigger the highest levels of anti-imperialist institutional opposition.

⁹⁵ See Maria Magdalena Sepúlveda *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 117-120.

⁹⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008 Doc.A/63/435, Art 2 and 4.

⁹⁷ See Michael J. Dennis and David P. Stewart 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 AJIL 462.

⁹⁸ Helfer and Slaughter (n. 50).

⁹⁹ Samuel Moyn *Human Rights and the uses of History* (Verso 2014) 67-8.

The Committee Against Torture was created at the same time as the Convention Against Torture (CAT). During the CAT's there was some considerable disagreement drafting about whether all states, regardless of their explicit consent, should be subject to the Committee's individual jurisdiction but the final text replicates that of Optional Protocol 1 to the ICCPR requiring state consent.¹⁰⁰ Crucially the CAT envisages a universal jurisdiction and in interpreting this Courts have held that it overrides other aspects of international law such as the immunity of heads of state. The CAT's preamble recognises "the equal and inalienable rights of all members of the human family" and sets out its aims to eradicate torture "throughout the world" regardless of any national legislation.¹⁰¹ The CAT states that the Committee should be comprised of individuals of "high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity" – along with the first part of this treaty, which details the behaviour constituting torture, these provisions create a universal knowledge, the second stage of universal negative referent, which is institutionalised in the Committee.¹⁰² Articles 20 and 21 of the CAT allow the Committee to make inquiries and conduct visits to states believed to be violating the CAT. The third and fourth stage of the negative universal referent can also be seen in Article 21 where it states that the Committee will make "available its good offices" to help states achieve solutions.¹⁰³ Further on in the same provision however there are also references to the Committee referring matters to the UN Secretary General, indicating the existence of a wider power of stigmatisation to apply against a non-compliant state. The Committee also relies on the *jus cogens* status of torture in international law, to assist in encouraging compliance with their decisions.¹⁰⁴

Generally there is a relatively good compliance rate with the Committee's decisions - over 50 % of all of their decisions are positively complied with or accepted by the state party.¹⁰⁵ This is in part indicative of the importance of prohibiting torture as an international norm and the cost of being categorised as a state that endorses torture. Empirical evidence suggests the Committee is able to utilize the pre-existing stigma in international law surrounding the state

¹⁰⁰ Suzanne Egan *The UN Human Rights Treaty System: Law and Procedure* (Bloomsbury Professional 2011) chp.9.

¹⁰¹ 1984 Convention Against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, Preamble.

¹⁰² Ibid. Art. 17.

¹⁰³ Ibid. Art 21 (1)e.

¹⁰⁴ See Chris Ingelse 'The Committee Against Torture: One Step Forward, One Step Back' (2000) 18 NHRQ 307

¹⁰⁵ Open Society Justice Initiative *From Judgement to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundation 2010)124.

practice of torture in the exercise of its protection mandate.¹⁰⁶ Additionally, as Heather Smith-Cannoy notes, there is some evidence that indicates that being categorised a human rights abusing state is more of a concern for autocratic states than democratic states.¹⁰⁷ This is less true of other organisations such as the Committee for the Elimination of All Discrimination Against Women, which whilst identifying human rights abusing states in its reference to victims, does not have quite the same level of pre-existing political capital to draw upon.¹⁰⁸ This is in part because of the considerable divergence opinion on what constitutes a violation of certain rights protected by the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), which has in turn hampered the operation of its Committee.¹⁰⁹

(3) The inherent imperialism of a protection mandate

The argument thus far is that in order to realise international human rights law within sovereign states an organisation's protection mandate requires the negative universal reference of a human rights violating state. The first section of this chapter outlined how international law's juridical universality was originally based upon a justificatory universality constructed using the colonial subject as a negative universal reference. The second section of this chapter argued in a similar vein that the human rights violating state provided the justificatory universalism for the protection mandates of human rights organisations. This section argues that the process of categorising a state as a human rights violating state through a protection mandate is inherently imperialist juridical process.

Imperialism, as the introduction to this study and chapter two argued, is characterised by a dominant relationship of power of one state/party over a weaker state/party, what Johan Galtung described as "as a dominance relation between collectivities", which was either focused on direct material dominance or a more complex form of legal dominance, with indirect material gain.¹¹⁰ Robert Zevin's definition of imperialism as the "qualified or unqualified rights of sovereignty beyond the previous boundaries" that a dominant state exercises over a weaker state attempts to define imperialism in non-historically contingent

¹⁰⁶ Jay Goodliffe and Darren Hawkins 'Explaining Commitment: States and the Convention against Torture' (2006) 68 Journal of Politics 358.

¹⁰⁷ Heather Smith-Cannoy *Insincere Commitments: Human Rights Treaties Abusive States and Citizen Activism* (Georgetown University Press 2012) 88.

¹⁰⁸ A/RES/54/4 15 October 1999, Art 2.

¹⁰⁹ For an example see Simone Cusack and Alexandra S.H. Timmer 'Gender stereotyping in rape cases: the CEDAW Committee's decision in *Vertido v The Philippines*.' (2011) 11 HRLR 329.

¹¹⁰ John Galtung 'A structural theory of imperialism' (1971) 8 Journal of Peace Research 81 and David Harvey 'In What Ways Is 'The New Imperialism' Really New?' (2007) 15 Historical Materialism 57.

terms.¹¹¹ Michael Hardt and Antonio Negri's definition of imperialism, which focuses on sovereignty extending beyond the boundaries of the nation state, is also premised on the idea of domination of weaker states by stronger states.¹¹² Whilst Marxists, and latterly structural theorists of imperialism, attempted to define international law's imperialism in terms of material relations of dominance and accumulation, dominance over sovereignty and sovereign decision making has also underpinned a large amount of the scholarship on the relationship between law and imperialism.¹¹³

The dominance of international law over sovereign states features heavily in James Tully's critique of international law. Tully contends that standard accounts of international law's history fail to account for patterns of informal imperialism, which are rife in international law, and "presume that imperialism ends with decolonisation."¹¹⁴ Rosa Brooks' account of international law's imperialism notes that promotion of external 'rule of law' initiatives in states with weak governance leads to international organisations exercising a form of external juridical dominance over the state.¹¹⁵ Another line of critique has focused on the continuation of imperialist dominance in the postcolonial world. Barbra Bush in a recent study of imperialism argues that there was no "sharp hiatus" between the colonial and postcolonial periods.¹¹⁶ This conclusion, Jennifer Peters notes, is endorsed by many critics of international law and is important for understanding that the existence of a postcolonial era does not mean the absence of imperialism.¹¹⁷ Imperialism in this analysis transcends its formal periodization within the colonial era, as demarcated by the legal process of decolonisation that began in 1960. The imperial context of international law, as detailed in chapter two, explains how the content and norms of international law either protected the interests of formerly colonialist states (residual imperialism) or facilitated states directly coercing other states (neo-imperialism).

However Tully, along with Fitzpatrick and Richard Joyce and Hardt and Negri all see the imperialism of international law as an instrument principally in the service of western

¹¹¹ Robert Zevin 'An Interpretation of American Imperialism' *The Journal of Economic History*, Vol. 32, No. 1 (1972), pp. 316-360

¹¹² Michael Hardt & Antonio Negri *Empire* (Harvard University Press, 2000) xiii.

¹¹³ See Marc Neocleous 'International law as primitive accumulation; or, the secret of systematic colonization' (2012) 23 *EJIL* 941.

¹¹⁴ James Tully *Public Philosophy in a New Key Vol.2* (CUP 2008) 131.

¹¹⁵ Rosa Ehrenreich Brooks 'The New Imperialism: Violence, Norms and the "Rule of Law"' (2003) 101 *Michigan Law Review* 2275.

¹¹⁶ Barbra Bush *Imperialism and Postcolonialism* (Routledge 2014) 7

¹¹⁷ Jennifer Pitts 'Political Theory of Empire and Imperialism' (2010) 13 *American Political Science Review* 211.

imperialism.¹¹⁸ This appears to describe how the USA used law in the period known as the 'New World Order' where economic liberalism was treated as the default position for states which, as Manfred Bienefeld argues, was a form of imperialism as it envisaged a monolithic world defined almost exclusively by the USA.¹¹⁹ However, to understand the imperialism of protection mandates it is important to focus less on the origins and application of international law and more on the implications and consequences of legal structures. This will help explain why anti-imperialist opposition to a supranational human rights organisation can exist even when that organisation has not been shaped by the imperial context of international law.

Inherent imperialism can exist in all forms of supranational organisation regardless of whether the organisation is regional or international in nature. Crucially inherent imperialism does not describe an organisation's actions but rather describes the type of power that the legal text of its structure envisages the organisation possessing. Kal Raustiala described an organisation's structure as being the organisational "rules and procedures created to monitor parties' performance".¹²⁰ It is the relationship that the text of these rules envisages that is important. If it envisages an ongoing and open-ended control of aspects of a state sovereignty by the international organisation, fitting in with the components of both Zevin and Galtung's definitions of imperialism which focuses on the notion of constricting of sovereignty, then it envisages an imperialist legal relationship, making it inherent to the organisation's structure. This makes inherent imperialism is a fixed component of a given legal regime that is non-ontologically contingent – the dominance it presupposes is not due to past association but due to organisational design.

As identified in chapter one power over domestic law-making is a crucial aspect of sovereignty and as Richard Joyce notes modern sovereignty is dependent on law-making.¹²¹ As described in the previous section the expulsion to an outgroup of states is a mechanism specifically designed to have a normative effect on the state in question and trigger a process of change to that state's laws. In chapter one it was argued that existing notions of state consent in international law do not adequately accommodate an organisations ipsetic potential, therefore whilst states might agree to vesting some form of authority in an organisation the

¹¹⁸ Fitzpatrick and Richard Joyce 'The Normality of the Exception in Democracy's Empire' (2007) 34 JLS 65. Hart and Negri (n. 112).

¹¹⁹ Manfred Bienefeld 'The New World Order: echoes of a new imperialism' (1994) 12 TWQ 31. See also Timothy Shaw 'The South in the 'New World (Dis)Order': towards a political economy of Third World foreign policy in the 1990s' (1994) 15 TWQ 17.

¹²⁰ Kal Raustiala 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 585.

¹²¹ Joyce *Competing Sovereignties* (Routledge 2013) 63-4.

full nature of an organisations ipsetic potential cannot be fully accounted for within the existing parameters of state consent. Therefore membership of a human rights organisation involves a state envisaging some form of external pressure from the organisation to change their laws. When one accounts for Joyce’s point about the interdependence of law-making and sovereignty, this by implication involves a state being subject to a form of external dominance. This is inherent imperialism in a nutshell – it is where an organisation has a legal structure that involves an open-ended form of dominance over states. For example, the International Monetary Fund (IMF), even were it not predominantly financed by western powers would be inherently imperialist as its legal structures have a variety of open ended discretionary powers to pressure states to change their laws that defy the notion of state consent.¹²² Given this basic definition of inherent imperialism, a protection mandate’s inherent imperialism comes in three distinct stages.

Firstly the role of stigmatisation and relegation to the out-group of states in the operation of a protection mandate needs to be understood as a mechanism for facilitating what Simpson describes as existential sovereign inequality.¹²³ To understand this concept it is necessary to understand existential equality. This differs from the formal equality of states under international law, which for example leads them each to receive one vote in the UN General Assembly and from legislative inequality, their right to participate in the making of international law.¹²⁴ Existential equality, Simpson argues, arises out of “recognition by the international community” that an entity is entitled to sovereignty that exists in “a form of the state’s own choosing”.¹²⁵ This includes the freedom to choose economic, cultural and political systems. As Simpson argues existential equality is a combination of three rights; the right to territorial integrity, the right to political independence and “the right to participate in the international system as a consequence of the first two rights.”¹²⁶ The ICJ has explicitly condemned violations “of the freedom of choice of the political, economic, social and cultural system of states” by coercive measures such as armed intervention or economic coercion.¹²⁷ A protection mandate is not directly coercive in that sense, but by placing a state in the category of human rights abusing states it aims to directly assault the right of a state to

¹²² The IMF does not have formal legal powers in this regard but the political pressure it can apply by suspending states voting rights is considerable – See Ian Hurd *International Organizations Politics, Law Practice* (CUP, 2010)74-6.

¹²³ Gerry Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2006 ed.)

¹²⁴ Postcolonial states lacked the latter of these rights see Chapter One.

¹²⁵ Simpson (n 123) 53-54.

¹²⁶ Ibid.

¹²⁷ *Republic of Nicaragua v. The United States of America* (1986) International Court of Justice Reports 1 para 263.

participate in the international system by virtue of the choices it makes about the conduct its domestic affairs. This directly affects what Krasner describes as a state's international-legal sovereignty as the operation of a protection mandate, as described in the second section of this chapter, is aimed at making it difficult for a state to be seen as an equal in its relations with other states.¹²⁸ This political process remains caught in the "savages-victims-savior" dynamic described by Mutua where victims of human rights abuses and the savages responsible for those abuses are identified by the savior of human rights law.¹²⁹ The savage is not the state per se but the state that engages in a "cultural deviation from human rights law".¹³⁰ As the first section outlined the idea of a savage-other that law had to civilize was at the heart of colonial-imperial international law and a protection mandate appears to mimic this. Whether or not an individual protection mandate is automatically successful in undermining a state's existential equality is not particularly important. Designating a state a human rights violator means that their ability to conform to the global script of legitimacy, conferred by notional compliance with human rights law is threatened. Therefore the potential designation of a state as a human rights violator represents an attempt from an organisation to deny a state external legitimacy.

Secondly the process of delegitimising a state's existential sovereignty is a precursor to actually controlling their sovereign decision making capacity. What moving a state to an outgroup does is diminish the scope of their decision making as in order to regain their existential sovereignty they will need to undertake specific policy or legislative measures in order to gain admission to the in-group of human rights compliant states. For example Article 46 of the ECHR requires state parties to "abide by" final judgements of the European Court of Human Rights and Article 2 of the CAT obliges state party's to "take effective legislative, administrative, judicial or other measures".¹³¹ This follows a long tradition in international law that Tully identifies, where international law diminishes truly independent democratic decision making and the scope of sovereignty by using a variety of "descriptive-evaluative names" of particular concepts such as free trade and civilization to "legitimate them and put them beyond question."¹³² As Pagden notes "all empires inevitably involve the exercise of imperium of sovereign authority" over a territory and as modern sovereignty is defined by the capacity to make positive law there is a fusion of the concept of lawmaker and sovereign authority.¹³³

¹²⁸ Krasner (n 3).

¹²⁹ Mutua (n 39).

¹³⁰ Ibid. 203.

¹³¹ ECHR Art 46(1), CAT Art 2(1) .

¹³² Tully 'Modern Constitutional Democracy and Imperialism' (2008) 46 Osgood Hall Law Journal 461, 478.

¹³³ Anthony Pagden 'Imperialism, Liberalism & the Quest for Perpetual Peace' (2005) 134 Deadelus 46, 47.

Constricting the scope of law-making by threatening the existential sovereignty of the lawmaker is therefore constricting the capacity of the government of a state to act as a sovereign.¹³⁴ This constraint often has an impact in areas of law-making critical to the state. As Sonia Cardenas notes security and security of the state is a core reason advanced by states as a defence of their human rights violations.¹³⁵ This means that in order to become a human rights compliant state there is an expectation that a state classed or about to be classed as a human rights violating states desists from a policy that it has identified as important for the protection of its security. For example the ECtHR has prohibited states from deporting individuals they deem to be a security risk if that individual is at risk of torture in the receiving state and the African Commission of Human Rights has held that states cannot suspend rights in times of emergency.¹³⁶ Both are decisions which a state may make in order to protect their security and in both cases a supranational organisation is effectively stating that unless the state complies with the organisations conception of what their laws ought to be they will attempt to delegitimise their existential sovereignty by utilizing their protection mandate.

Finally the constraints on sovereignty described in the second stage have a distinct teleological element to them. As human rights violating states are explicitly bidden by the structure of protection mandates to transform themselves into human rights compliant states, there are genuine questions as to what human rights compliant states are, what they are expected to be and how the state is supposed to transform itself. States in the category of human rights compliant states are often described as western or located in the west. Emilie Hafner-Burton observed in a study of the empirical evidence on compliance that states where societies have been persuaded that international human rights organisations are legitimate are also most likely to be the states where people have been persuaded that “laws are legitimate.”¹³⁷ The conclusion Hafner-Burton reaches is that compliance with international human rights law, and by logical extension compliance with the exercise of an organisation’s protection mandate, is at its greatest in western democracies, in particular European states.¹³⁸ Beth Simmons in a similar vein also notes that international human rights law works best where “conditions exist” for political stability and then goes onto list a series of illustrative features of a political system that generates stability which are particularly prevalent in western European states.¹³⁹

¹³⁴ Joyce (n. 121).

¹³⁵ Sonia Cardenas *Conflict and Compliance: State Responses to International Human Rights Pressure* (University of Pennsylvania Press 2010) 27-9.

¹³⁶ See respectively *Chahal v UK* [1996] ECHR 54 and *Commission Nationale de Droits de l’Homme et des Liberties v Chad* Communication No. 74/92 (1995).

¹³⁷ Hafner-Burton (n 2) 5.

¹³⁸ *Ibid.*

¹³⁹ Beth Simmons *Mobilizing for Human Rights: International Law and Domestic Politics* (CUP 2009) 16-17.

The subtext of these conclusions is that human rights compliant states are predominantly western and therefore by implication human rights violating states, that are non-western, need to emulate western states in order to move out of the category of human rights violating states. This is a somewhat simplistic extrapolation of this empirical research and there are some broader reasons as to why there is a correlation between compliance with international human rights organisations and western states. For example Courtney Hillebrecht notes that states with an independent judiciary and an active civil society space for NGOs to operate are often necessary to ensure the decisions of human rights organisations are implemented domestically because of the lack of legal powers organisations have over domestic legal systems.¹⁴⁰ However, the reason that states in the west predominantly possess these attributes is in part due to colonial-imperialism, which created weak legal institutions and left artificially constructed states in its wake.¹⁴¹ Even in the case of organisations that are distinctly non-western in origin, such as those discussed in chapter four, there is still the presumption inherent within the third and fourth stage of the negative universal reference that the excluded will become the universal and that the human rights violating state will progress towards a form of human rights compliant state.

This three-step process shows how by placing a state within the out-group of states an organisation is an attempt to exercise control over that state's law-making processes. This is a form of domination that conforms with the basic definition of imperialism set out above. Whether this is a precursor for wider domination by an actual imperialist state, is not particularly important. The important feature of inherent imperialism is that a legal instrument explicitly envisages the domination and demotion of sovereignty. Equally, the organisation does not have to be effective in exercising its protection mandate for its inherent imperialism to motivate state behaviour. In all of the cases of anti-imperialist opposition detailed in the last two chapters there was a general concern among states not to be categorised as a human rights violating state. In chapter three it was shown how anti-imperialist opposition arose through double standards from the Third World bloc when there was the possibility of states from the Third World bloc being categorised as human rights abusers by the UN Human Rights Commission. Concerns about judges being able to declare a state a human rights violating state was the cause of the anti-imperialist institutional opposition to the Southern African Development Community Tribunal detailed in chapter four and was also forefront of the

¹⁴⁰ Courtney Hillebrecht *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (CUP 2014) 22.

¹⁴¹ For an overview of this argument see Obiora Okafor 'After Martyrdom: International Law, Sub-State Groups and the Construction of Legitimate Statehood in Africa' (2001) 41 HJIL 503.

collective anti-imperialist ideological opposition to the International Criminal Court detailed in chapter two. This also explains why states use pre-emptive opposition in the design of regional organisations. Cardenas notes in a study of domestic human rights organisations, that where there is considerable external pressure for organisations to be created, these organisations are often “relatively powerless.”¹⁴² Creating an organisation without a protection mandate, or constructing a protection mandate that can be entirely controlled by states, enables states to present themselves as appearing to be human rights compliant without actually running the risk of being categorised as a human rights violating state. This was the case with the ASEAN human rights commission examined in chapter two and to an extent the African Court of Human and Peoples Rights examined in chapter four.

The inherent imperialism of protection mandates arguably renders moot any attempt to decolonize the instruments of international human rights law containing protection mandates. Imperialism is part of the design of a protection mandate, as they require an organisation to take and make decisions about the content of a state’s laws. This is backed up by the implicit power to undermine a state’s existential sovereignty by placing it in the category of human rights violating states. Thus a protection mandate envisages a human rights organisation being in a dominant legal relationship over its member states.

(4) The historical context of organisational design: diminishing the impact of protection mandate’s inherent imperialism

Given the inherently imperialist nature of a protection mandate it seems inevitable that all human rights organisations will experience some form of anti-imperialist opposition. Yet in practice not all organisations face the same level of anti-imperialist opposition or any real anti-imperialist opposition. In part this is because anti-imperialist opposition also stems from the imperial context of international law which causes juridical marginalization that some states, most notably those in the Western Europe and Other bloc at the UN, did not experience. There is however another dimension to this as organisations which experience only limited levels of anti-imperialist opposition have been able to legitimize their protection mandates as protecting human rights has aligned with some broader political objective shared by the member states of that organisation. Where the legitimisation of the inherent imperialism of a protection mandate has occurred this has reduced or eliminated anti-imperialist opposition.

¹⁴² Sonia Cardenas ‘National Human Rights Institutions and State Compliance’ from Ryan Goodman and Thomas Pegram *Human Rights, State Compliance, and Social Change* (CUP 2012) 32-5.

Legitimacy has a multitude of meanings and it is important to first understand different competing definitions of legitimacy before looking at the legitimisation of a protection mandate. Daniel Bodansky in his review of the international relations literature on institutional legitimacy observes that a variety of different features, such as transparency, public participation and deliberation, normally account for an adjudicative institutions legitimacy in a domestic constitutional system.¹⁴³ The extent to which supranational human rights organisations possess these attributes is unclear which is problematic for their wider claim to legitimate authority over states.¹⁴⁴ Ingo Venzke argues that legitimacy is best understood as a form of authority which influences state conduct in a manner that is distinct from coercion and persuasion.¹⁴⁵ There are three types of legitimacy, which are relevant to the consideration of a supranational organisation. Firstly “ideal-type” legitimate authority, Stephen Wheatly argues, is where an organisation is considered legitimate because its actions align with and anticipate the interests of those over who it has authority.¹⁴⁶ A second form of legitimacy is what Tomas Franck describes as source legitimacy where the origins of the law come from a ‘valid source’ and the law itself and the organisation applying the law are seen as legitimate.¹⁴⁷ Finally many theories of justice in society point to the importance of institutions possessing a content independent claim to legitimacy where the institution and not the results it produces lead to it being considered legitimate. Lynne Dobson notes that generally the legitimacy of adjudicative institutions is content-independent – a court can pass a judgment that people disagree with but the court is still considered legitimate.¹⁴⁸ In relation to the legitimacy of protection mandates it is the first and third of these types of legitimacy which are important. A regional organisation, such as the African Commission of Human and Peoples rights may possess source legitimacy because of its origins but this would be insufficient to legitimise the inherent imperialism of its protection mandate. When trying to achieve compliance with contentious decisions, whether or not a state believes the organisation is protecting some wider long-term interest, even if it disagrees with the organisation over a specific case, is important for achieving both ideal-type and content independent legitimacy.

¹⁴³ Daniel Bodansky ‘Legitimacy in International Law and International Relations’ from Jeffery Dunoff and Mark Pollack *Interdisciplinary Perspectives of International Law and International Relations: The State of the Art* (CUP 2013) 337.

¹⁴⁴ Ibid.

¹⁴⁵ Ingo Venzke ‘Understanding the Authority of International Courts and Tribunals: On delegation and discursive construction’ (2013) 14 *Theoretical Inquiries in Law* 381.

¹⁴⁶ Stephen Wheatley ‘On the legitimate authority of international human rights bodies’ from Andreas Føllesdal et al *The Legitimacy of International Human Rights Regimes: Legal, Political Philosophical Perspectives* (CUP 2014) 97-8.

¹⁴⁷ Tomas Franck ‘Legitimacy in the International System’ (1988) 82 *AJIL* 705, 706

¹⁴⁸ Lynn Dobson ‘Legitimacy, institutional power and international human rights institutions: a conceptual enquiry’ in Andreas Føllesdal et al (n 146).

It is important at this point to remember the distinction between human rights organisations, formed solely for the purpose of protecting human rights from supranational organisations formed for another purpose that also have a protection mandate. Organisations in the latter category, such as the Regional Economic Communities described in the last chapter, have an alternate form of legitimacy outside of the protection of human rights. They intertwine the protection of human rights with economic advancement meaning that states have broader material incentives to comply with their protection mandates. Whilst these organisations are subject to opposition their integration of human rights and economic interaction provides a distinct material advantage to states. This not only provides a direct reason for compliance but in the longer term ongoing interaction with the organisation can generate a culture of compliance lessening anti-imperialist opposition by legitimising the inherent imperialism of a protection mandate. This was demonstrated in the previous chapter with the analysis of the Court of Justice of the Economic Community of West African States (ECOWAS) which has faced limited opposition in part because it operates within the wider framework of economic interaction created by ECOWAS.

Organisations that exist purely to promote human rights do not have such direct benefits to states. These organisations confer benefits solely upon within individuals not the state itself, generating what Simmons terms the inverse legitimacy conundrum.¹⁴⁹ This breaks down the assumption behind rational design theory that there is a transaction between states that organisations can in some way manage through organisational dispute resolution systems.¹⁵⁰ Rational design theories maintain that states are risk adverse when participating in international organisations but both realist and rational design theorists recognize that states are willing to accept these risks if the rewards for cooperation and compliance with an organisation are direct and clear.¹⁵¹ In an organisation solely designed to protect human rights the state bears all of the costs of the transaction and receives relatively few gains, which is why some states attempt to conform to the global script of legitimacy by signing up to human rights agreements with no protection mandate. This is a particular problem in judicial-review type organisations or treaty review bodies because their adjudicative function means that they have a much greater ipsetic potential.

¹⁴⁹ Beth Simmons (n 139) 126.

¹⁵⁰ For an example see Karen Alter *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014) 45-6, 65.

¹⁵¹ Barbara Koremenos et al. *The Rational Design of International Institutions* in Barbara Koremenos et al. (eds.) *The Rational Design of International Institutions* (CUP 2004) 22.

Where supranational organisations have successfully achieved a degree of ideal-type and content-independent legitimacy is when they have reflected a coincidence of interests among a group of states. As Jackson and Posner note, this is hard to achieve and the most successful model of this - the ECtHR which has managed to achieve a reasonably high degree of acceptance and compliance – did so by the coincidence of interests being “already shared by the states”.¹⁵² It was also accompanied by a high degree of economic integration among member states independent of the organisation’s existence.¹⁵³ This created a virtual community of European states where signing up to the ECHR was seen as a mechanism of locking in a particular form of benefits. Scholars in areas other than human rights have identified the tendency of states to join relatively powerful supranational organisations when they want to ‘lock in’ a set of policy preferences.¹⁵⁴ Rational design theorists such as Jonas Tallberg argue that the construction of organisations to which states delegate powers enables them to lock-in policy preferences that affect a state’s future behaviour.¹⁵⁵ The existence of a longer term set of interests helps explain how an organisation can command legitimate authority for its decisions.

Joseph Raz notes that a legitimate source of authority involves an individual suspending their own individual judgment in favour of that source of authority’s judgment.¹⁵⁶ An individual would do this without recourse to their own reasoning and Raz is clear that this does not involve abandoning the idea of autonomy but instead reaching a conclusion that “all things considered” it is worth recognizing an external source of authority.¹⁵⁷ Applying Raz’s reasoning to the situation posed by the protection mandate of a human rights organization; a state would consider the organization legitimate if all things considered there is a long term interest in accepting a protection mandate for the benefits that it locks in, even though there is the risk of their external sovereignty being delegitimized by them being categorized as a human rights violating state. This would be true even under an interactional theory of international legal compliance which maintains that compliance with international law is achieved through state practice being guided and shaped by interaction with legal norms without recourse to

¹⁵² Jack Goldsmith and Eric A Posner *The Limits of International Law* (2nd ed OUP, 2007) 112-115.

¹⁵³ *Ibid.*

¹⁵⁴ In relation to economic preferences see Peter Rosendorff and Helen Miller ‘The Optimal Design of International Trade Institutions: Uncertainty and Escape’ (2001) 55 IO 829. In relation to human rights see Andrew Moravcsik ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 IO 217.

¹⁵⁵ Jonas Tallberg ‘Delegation to Supranational Institutions: Why, How, and with What Consequences?’ (2002) 25 *West European Politics* 1.

¹⁵⁶ Joseph Raz *The Authority of Law* (2nd ed. OUP 2009) 22.

¹⁵⁷ *Ibid.* 24

coercion.¹⁵⁸ This theory still requires a framework of law which can be considered legitimate and can then provide what Jutta Brunnée and Stephen Toope describe as legal practices, where a series of interactions with the law encourages state compliance.¹⁵⁹ At the heart of a supranational organisation's claim to legitimacy therefore is the idea that there exists or can exist a common shared interest in locking-in a series of long term policy preferences.

Crucially in the context of supranational organisations this inter-state shared interest must entail that a member state of an organisation can be classified as a human rights violating state. Membership of the ECtHR was in part driven by democratic idealism but equally as important was the concern that liberal-democratic European states faced a broader existential threat to their survival and that a human rights organisation, backed up by an activist court, was a mechanism for guaranteeing that they would not be subject to a totalitarian takeover.¹⁶⁰ This was a real threat in 1949-50; many of those directly involved in drafting the ECHR would have fled invading Nazi forces in the early 1940s and with Soviet domination of Czechoslovakia in 1947 and the Berlin blockade of 1948 there was a genuine panic about domination by another form of totalitarianism. Even though this subsided in the 1950s the idea of human rights as an ideological counterweight to the Soviet Union, for many years remained a powerful argument in favour of compliance with the ECtHR. The historical narrative of its formation was a means of inferring the set of benefits that states sought with organizational membership and served to legitimise the inherent imperialism of its protection mandate.

After the collapse of communism in Europe in 1989-90 membership of the ECtHR became a means for states from the former eastern bloc to demonstrate their commitment to democratic transition.¹⁶¹ Most of the statistical research on compliance within the ECtHR's judgments shows that its compliance rate is relatively high for a supranational human rights organisation although there is some evidence that indicates that countries with weaker domestic court systems, which for the most part include states from the former Soviet bloc, have higher instances of institutional opposition.¹⁶² The locking-in of liberal-democratic policies described above implicitly involves the state envisaging itself as a human rights

¹⁵⁸ For an example see Jutta Brunnée and Stephen Toope *Legitimacy and Legality in International law: An Interactional Account* (CUP 2010) 6-12.

¹⁵⁹ Ibid.

¹⁶⁰ Ed Bates *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 44-68.

¹⁶¹ Steven Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2008) 24-32.

¹⁶² See Courtney Hillebrecht 'The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change' (2014) EJIR and Andreas von Staden 'Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights' (2012) Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000024 accessed 12 Dec 2014.

violating state as it is seeking to safeguard its domestic institutions from being used to commit human rights abuses. This is contingent upon a particular historical experience and it is noteworthy that states that joined the ECtHR later, and thus in a very different historical context from those who drafted the ECHR, appear, by virtue of their comparatively higher rates of opposition, to potentially have a different view on the legitimacy of the organisation's protection mandate.

This is a crucial difference between the ECHR and the ACHPR; the historical narrative of the former envisages member states becoming human rights violating states to legitimize its protection mandate, the historical narrative of the latter focuses on anti-colonialism as a source of legitimacy. As outlined in chapter one, anti-colonialism describes the specific politics of opposing colonial-imperial rule in the mid-twentieth century and was associated with the General Assembly campaigns on decolonisation and ending apartheid. The problem with anti-colonialism, as Jack Donnelly argues, was that it became "a self-liquidating venture, as colonies [became] independent countries" and as a consequence it did not build a basis for human rights protection beyond the foundation of new nation states.¹⁶³ Anti-colonialism created a content-contingent set of reasons for viewing a protection mandate as legitimate (the content being the creation of an independent postcolonial nation state) and crucially viewed an external force (European colonialism) as being the principal source of human rights abuses. As noted in chapter three the Third World bloc were often in favour of organisations such as the CERD Committee and the UN Committee on Decolonisation, because the operation of their protection mandates supported decolonisation and predominantly identified colonial-imperialism as the source of human rights abuses. Direct anti-imperialist opposition to the UN Commission on Human Rights started when it began exercising its protection mandate within postcolonial states.

Commenting on the AU's model of regional integration Anel Ferreira-Snyman noted that it was underpinned by a pan-Africanist philosophy that had determined "that the effects of colonialism, alienation, and marginalisation" could be "remedied by the forging of African unity."¹⁶⁴ This was very different to the political forces that motivated cooperation in the Council of Europe which as Luzius Wildhaber notes were initially driven by a desire to "defend democracy against its totalitarian enemies" and later to prescribe the limits "in terms of human rights" on the "exercise of public power in European liberal democracies committed to

¹⁶³ Jack Donnelly 'Recent Trends in UN Human Rights Activity: Description and Polemic' (1981) 35 *International Organisation* 633, 636.

¹⁶⁴ Anel Ferreira-Snyman 'Regional organisations and their members: the question of authority' (2009) 42 *Comparative and International law Journal of South Africa* 813, 818.

the rule of law.”¹⁶⁵ Wildhaber’s argument sees a shared common organisational approach to sovereignty in the two which as Niall MacCormick argues led to the creation of a form of “new and not-yet-well-theorized legal and political order” that sought to constrict the power of the sovereign state.¹⁶⁶ As Ferreira-Snyman argues it was doubtful whether African states would meaningfully agree to “such a far-reaching limitation on their sovereignty” because it would be regarded “as neo-colonialism by some African states that still fiercely guard their new-found sovereignty.”¹⁶⁷ Even if this is a view held by a minority of states as noted in chapter four, anti-imperialism serves as a useful rhetorical mechanism to rally support from other states against an organisation with a protection mandate. The ACHPR pointed towards the external threat of colonialism and apartheid and the emphasis placed by many scholars on the Commission’s non-confrontational processes did not explicitly envisage the existence of a human rights violating state.¹⁶⁸ Because anti-colonialism as an ideology was based on territories under colonial rule gaining independence and becoming postcolonial states it had to envisage formerly colonialist states as the source of human rights violations. As a matter of logic anti-colonialism could not envisage a postcolonial state as a human rights violating state because as chapter one argued, anti-colonialism was focused upon identifying colonialism as a human rights abuse.

It is important to take a step back for a moment and acknowledge that the historical narrative of a human rights instrument is not something an organisation uses to ensure day to day compliance. Some commentators have noted that the reason the ECtHR has a relatively low level of opposition, is that it allows states a wide margin of appreciation in the implementation of rights under the ECHR and often achieves a lot through soft review processes, where it identified technical non-compliance with the ECHR.¹⁶⁹ Shany notes that overtime this has allowed the Court to make “higher-cost” judgements imposing greater obligations upon member states as there is a relatively strong overall expectation of compliance.¹⁷⁰ However, it is these high-cost judgments, which are statistically more likely to trigger institutional

¹⁶⁵ Luzius Wildhaber ‘European Union, European Convention on Human Rights and Human Rights Protection in Europe’ (2009) 26 *Ritsumeikan Law Review* 155, 157-8.

¹⁶⁶ Niall MacCormick *Questioning sovereignty: law, state and nation in the European Commonwealth* (1999) 124-125.

¹⁶⁷ Ferreira-Snyman (n 164).

¹⁶⁸ See chapter 4.

¹⁶⁹ R St J Macdonald ‘The Margin of Appreciation’ in R Sr J MacDonald, F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 123.

¹⁷⁰ Shany (n 75) 130.

opposition and call the legitimacy of a protection mandate into question.¹⁷¹ This does not morph into anti-imperialist institutional opposition if there is a consensus, reflected in a common historical narrative, which helps mitigate the inherent imperialism of a protection mandate. Empirical evidence presented by Smith-Cannoy shows, that in cases where there is a lack of consensus about organizational aims and strong pre-existing political factors encouraging opposition (such as sovereign inequality) that states either refused to become members of an organisation with a protection mandate, or engaged in pre-emptive opposition or engaged in extreme forms of institutional opposition, such as anti-imperialist opposition.¹⁷² This can also apply to other extreme forms of institutional opposition, as was the case with US exceptionalism towards human rights organisations described in chapter one. There was no historical narrative to encourage compliance and reconcile the costs of membership of treaty bodies and there was a very strong counter narrative of US democratic exceptionalism to encourage extreme institutional opposition.

The Inter-American Court of Human Rights provides an interesting case study of this overall principle. The Inter-American Court has a weaker record of compliance than the ECtHR but, as Hillebrecht argues, relies on the common political narrative of organisational compliance being associated with the transition from military dictatorship.¹⁷³ Shelton in her history of the Inter-American Court noted that in the 1950s at regional meetings of the Organization of American States (OAS) various commitments were made that focused on human rights as the basis for inter-state cooperation among OAS member states.¹⁷⁴ Whilst this was similar to the ECHR it was a slightly weaker foundational narrative due to differing regional and historical contexts, and did not quite give rise to a similar set of shared benefits. At the time the OAS consisted of a number of states that were military dictatorships and the commitment to using the Court as a vehicle for democratization was something that came with the wave of democratization in region in the 1980s, it was not a justification for the creation of the organizations protection mandate. Crucially the Inter-American Human Rights Commission and the Court's jurisdiction to hear individual cases had not evolved as a mechanism for enabling litigation against state parties but was principally an information gathering mechanism.¹⁷⁵ As Tom Farer notes during

¹⁷¹ Dia Anagnostou 'Politics, courts and society in the national implementation and practice of European Court of Human Rights case law' from Anagnostou (eds.) *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press, 2014) 212,214.

¹⁷² Smith-Cannoy (n. 107).

¹⁷³ Hillebrecht (n. 140) 8-10.

¹⁷⁴ Dianne Shelton *The Jurisprudence of the Inter-American Court of Human Rights* (1994) 10 American University International Law Review 333.

¹⁷⁵ Cecilia Medina 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture' (1990) 12 HRQ 439, 441.

the 1970s the Commission's protection mandate principally relied on the process of political exposure and it lacked any form of institutional censure or sanction.¹⁷⁶ When in the 1980s individuals wanted remedies such as injunctions and damages they began pursuing cases at the Inter-American Court which then acquired its democratizing role. Nevertheless this loose pro-democratic foundational narrative facilitated a comparatively high degree of compliance between the Court and state parties and its protection mandate was more powerful than the African Court of Human Rights.¹⁷⁷

As James Cavallaro and Stephanie Brewer noted the court was able to successfully align itself with political forces within states which were able to influence state policy.¹⁷⁸ Compliance data shows a rough correlation between the rise of democratization in the region in 1980s and 1990s and partial or full compliance with the Inter-American Court's contentious decisions – decisions that go against state parties.¹⁷⁹ Cases involving immunity laws for paramilitary forces or law enforcement agencies, for human rights abuses perpetrated under military regimes were often complied with by state parties.¹⁸⁰ These cases directly related to the process of democratization within states. One interesting feature of the Court's work was the system of *allanamientos* where states could acknowledge their role in human rights violations prior to the court making a ruling against the state. This voluntary declaration by a state that they had violated human rights again principally occurred in areas where the case accorded with the overall shared goal of democratisation.

Institutional opposition to the Court and Commission started emerging as many states refused to adopt mechanisms to directly implement their decisions.¹⁸¹ This was the wider context behind what was described as an "implementation crisis" in 2009 when it was revealed that nearly 85% of Court judgments were not being implemented.¹⁸² The cases where there was the highest level of non-compliance were where the Court openly criticized societal institutions or members of the executive – indicating an increasingly defensive approach to

¹⁷⁶ Tom Farer 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19HRQ 510.

¹⁷⁷ On Compliance see Alexandra Huneeus 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493.

¹⁷⁸ James Cavallaro and Stephanie Brewer 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2006) Harvard Law School Public Law & Legal Theory Working Paper Series Paper No. 09-31 available at <<http://ssrn.com/abstract=1404608>> accessed 10 July 2015.

¹⁷⁹ Ibid.

¹⁸⁰ For an example see *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

¹⁸¹ Robert Goldman 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 HRQ 856, 883-884.

¹⁸² Huneeus (n 177) 507.

sovereignty.¹⁸³ There was also some anti-imperialist opposition towards the Court. Venezuela's withdrawal from the Court's jurisdiction in 2012 was overtly anti-imperialist with the government criticising the Court for engaging in "political manipulation" and accusing it of being a Trojan horse for US imperialism.¹⁸⁴ When the Dominican Republic withdrew from the Court it was over a technical dispute over the interpretation of constitutional law but the background to it was the wider issue of domestic legal sovereignty, particularly in relation to the control of immigration and the Dominican courts had resisted implementing several judgements of the Inter-American Court.¹⁸⁵ As Gerald Neuman concluded the Court risked expansive interpretations risked becoming "too divorced from the consensual aspect" of a regional human rights organization and absent "strategic institutional design" this risked undermining its broader legitimacy.¹⁸⁶ The legitimising historical narrative of democratic transition from military dictatorship was broadly useful in securing a consensus among member states during the initial period of its operation but was insufficient to prevent more severe instances of institutional opposition and anti-imperialist opposition emerging over time.

An important aspect of the rational design theory of international organisations is as Barbara Koremenos notes that "the value of future gains is strong enough" to support cooperation with other states and interaction with the organisation.¹⁸⁷ The future gains of membership of a human rights organisation with a protection mandate are somewhat unclear for state parties because of the inverse legitimacy paradox identified earlier in this section. Therefore organisations require strong content-independent legitimacy, in the form of a legitimising historical narrative which can outline benefits to ongoing compliance, mitigate the costs of enforcement and is clear at the time of the organisation's formation. This can in turn minimize extreme forms of institutional opposition, such as anti-imperialist opposition. The formation of the African Commission was undertaken without any clear consensus about the ongoing benefits of compliance for states or a sense of why a member state could become a human rights violating state. Protection mandates are not an inherently Eurocentric ideal but are often associated with states that have embarked on some form of historical transition

¹⁸³ Ibid 503.

¹⁸⁴ Rachel Boothroyd 'Chavez Announces "Immediate" Withdrawal from Inter-American Court of Human Rights' 26 July 2012 available at <http://venezuelanalysis.com/news/7131> accessed 10 July 2015.

¹⁸⁵ Adison Morris 'Dominican Republic leaves Inter-American Court of Human Rights' Jurist 6 November 2014 <http://jurist.org/paperchase/2014/11/dominican-republic-leaves-inter-american-court-of-human-rights.php> accessed 10 July 2015.

¹⁸⁶ Gerald Neuman 'Import, Export and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101, 123.

¹⁸⁷ Koremenos (n 152) 21.

involving human rights and the re-conception of their sovereign authority. The sense of democratic crisis among western European states in the late 1940s enabled a relatively clear consensus to be reached on the creation of a human rights court with a powerful protection mandate. What Brunnée and Toope term legal practice, the process of states in the ECHR regularly complying with relatively low-cost judgments, enabled the institution to increase its compliance power but its historical narrative also enabled it to maintain compliance rates when issuing contentious high-cost judgments.¹⁸⁸ Conceiving regional human rights organisations as a bulwark against colonialism did not engender such a process as it did not create a shared sense among member states of an organisation that they could also become human rights violating states.

Conclusion

This chapter showed how the process that an organisation's protection mandate uses to try and engender compliance from states is inherently imperialist. Supranational human rights organisations have limited powers to directly pressure a recalcitrant member state into compliance therefore they try and exploit the broader international political concern among states to appear human rights compliant by creating juridical categories of human rights compliant and non-compliant states. Benhabib noted that juridically universal mechanisms require a justificatory universalism and in the case of protection mandates the justification is the negative reference of the rogue or outlaw state that defies international law.¹⁸⁹ The existence of human rights violating states justifies the ipsetic potential of a protection mandate as the organization attempts to make states human rights compliant by directing them to change their domestic laws or face stigmatization. This process does not necessarily work but its presence in the legal structure of a protection mandate is significant as it shows that the organization is attempting a form of dominance over a states lawmaking powers. Additionally as the first section demonstrated, the construction of universality via a negative reference was how international law's universality was developed during the process of colonial imperialism. Thus a protection mandate not only mimics a process associated with colonial-imperialism but it also envisages a form of dominance over states which is inherently imperialist.

The inherent imperialism of protection mandates should make anti-imperialist institutional opposition a near inevitability for all organisations and the prevalence of anti-imperialist

¹⁸⁸ Brunnée and Toope (n 155).

¹⁸⁹ Benhabib (n. 6).

institutional opposition among postcolonial states reflects their sovereign inequalities, described in chapter one. In practice however it is possible for states to consider a protection mandate legitimate. But this requires a shared consensus among states as to the benefits of entering into an organisation which risks them being categorised as human rights violating states and requires the organisation's design to reflect this consensus. Anti-colonialism, unlike the historical narrative that reflected the shared consensus behind the ECHR's formation, did not provide this. As discussed in chapter one and illustrated in chapters three and four, the Third World bloc's anti-colonialism maintained that colonialism was the source of human rights violations, meaning that only formerly colonialist states could be human rights abusing states.

Inherent imperialism explains the persistence of forms of direct and pre-emptive anti-imperialist opposition within the regional organisations created by postcolonial states. As the previous chapter demonstrated, whilst it is possible to decolonize human rights law, removing it from its imperialist context, it has not proved equally possible to decolonize the enforcement of human rights law by a supranational organization. This is because absent the capacity to harness the political stigma associated with the designation of a state as a human rights violating state there is no direct mechanism for an organization to pressure states into engaging in domestic legal reform. Absent an effective alternative legal structure, protection mandates will continue to be designed with an inherently imperialist structure.

Conclusion

“Simple solutions do not work” Katarina Tomaševski argues noting that the legalisation of human rights into has resulted in a criminal-law mentality where there is a clear victim and violator, who must be eventually punished by the law.¹ This, as noted in the last chapter of this study, helps generate claims from postcolonial states that human rights organisations are in and of themselves imperialist. International law was created in the era of colonial-imperialism with the image of the subordinated colonial territory in mind. Even in the postcolonial era international law generated juridical inequalities between postcolonial and formerly colonial states. Mukau Mutua’s analysis of the savages-victims-saviour dynamic of international human rights law illustrates how the need to establish the existence of a human rights violator invariably results in the utilisation of a legal formulation rooted in colonial era thinking.² Given this context it is hardly surprising that a legal mechanism which depends on marginalising states, relegating them to the out-group of human rights violating states, is likely to be viewed by postcolonial states as a continuation of their historic marginalisation under colonial-imperialism. This is inherent imperialism, as these legal instruments envisage imperial dominance independent from the colonial-imperial context of international law’s creation.

Absent a legal structure that allows direct coercion to protect human rights, supranational human rights organisations rely on the framework of customary international law and the law of treaties to enforce human rights within states. This is problematic because international human rights law offers rights to the citizens of states to use against their governments and because in international law the government of the state remains the recognised actor, there is an implicit tension within the relationship between compliance with international human rights law and state sovereignty.³ This creates a complicated politico-juridical landscape in which there exist strong incentives to demonstrate human rights compliance, by signing up to human rights agreements, but relatively weak incentives to make that compliance concrete. As Sonia Cardenas notes there are three central reasons states give for not fully complying with international human rights law – national security, appeasing a domestic constituency or

¹ Katarina Tomaševski *Responding to Human Rights Violations, 1946-1999* (Martinus Nijhoff 2012) xi.

² Makau Mutua ‘Savages, victims and saviours: The Metaphor of Human Rights’(2001) 42 *Harvard Journal of International Law* 202.

³ See Beth Simmons *Mobilizing for Human Rights International Law in Domestic Politics* (CUP 2009) 126.

cultural exceptionalism.⁴ These are all in some way related to democratic sovereignty or to the biopolitical control of individuals within the modern nation state.

Organisational protection mandates, described in the beginning of this study as the collection of legal powers governing the enforcement of human rights by an organisation in one of its member states, are as a juridical form inherently imperialist. As chapter five argues the only option for an organisation that seeks to protect human rights within states but lacks direct coercive powers, is to utilise the general political incentive that links a states' external sovereignty to human rights commitments and for organisations to frame that within a juridical structure to encourage compliance with its decisions. This is a juridically constructed form of shaming to encourage compliance and its effectiveness varies. Whilst there is some evidence available that shaming has an effect on state parties' behaviour within an institutionalised environment there is no direct evidence of the effect that the growth or development of protection mandates has upon instances of opposition. This would be an area for further empirical research to test some elements of the theoretical hypothesis advanced in this study.

Protection mandates are inherently imperialist as they envisage an organisation attacking a states existential sovereignty and the creation of uniform laws within states.⁵ This is imperialist, no matter the context, as it juridically envisages an international organisation having a degree of control over the lawmaking process within a state and as modern sovereignty is contingent upon control of the lawmaking process this is a form of control over a state's sovereignty. The extent to which this actually encourages anti-imperialist opposition from a state is to an extent dependent on the impact that the attempted denigration of a state's existential sovereignty has on other aspects of their sovereignty and on whether their sovereignty was juridically unequal in the first place. Equally, as discussed in chapter one, standard notions of state consent in international law, which can be used to justify the restriction of sovereign powers by an international instrument, are more difficult to apply to human rights organisations because of their ipsetic potential. This compounds the problem of inherent imperialism resulting in anti-imperialist opposition. Pre-emptive anti-imperialist opposition can be understood using rational design theories of organisations. According to rational design theory states construct organisations to both reflect their interests and whilst

⁴ Sonia Cardenas *Conflict and Compliance: State Responses to International Human Rights Pressure* (University of Pennsylvania Press 2010) 27-9.

⁵ Existential sovereignty is the states capacity to govern their domestic political system. For an explanation of the concept see Gerry Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2. ed CUP 2006) 53-54.

willing to potentially delegate aspects of their sovereignty are risk averse in doing so. The construction of organisations with intentionally weak or non-existent protection mandates was states attempting to design the organisation in anticipation of future anti-imperialist opposition.

If the juridical form of the protection mandate is at the root of anti-imperialist opposition it is worth taking the issue raised at the end of chapter four one step further; is possible to decolonise international human rights law fully by removing protection mandates from international organisations? This effectively would end the enforcement of human rights by supranational human rights organisations as we know it. As Tomaševski argues “the price” for not having a legal regime to enforce human rights is that human rights becomes “emptied of contents” transforming it into “it into a weasel-word” that can be “filled with new contents with every change of the political fashion of the season”.⁶ Human rights as Joseph Raz argues exist to be enforced as they are meant to acknowledge that some laws passed by the governments of some states are incompatible with protections and guarantees that are owed to individuals as of right.⁷ In the *Origins of Totalitarianism* when Arendt castigates the failings of the rights of man to offer any meaningful protections to refugees feeling persecution her target is in part the failings of natural rights to offer enforceable guarantees of citizenship and protection.⁸ In many ways the concept of a ‘right to have rights’ can be read as a guarantee for the protection of human rights, a step which logically presages their enforcement.⁹ The idea behind the creation of the Universal Declaration of Human Rights (UDHR) was to enforce human rights. Lawyers such as René Cassin and Hersch Lauterpacht who were influential in the mid-1940s in shaping the ideas behind the UDHR wanted a system of universal rights in order to prevent Nazism and fascism from ever occurring again.¹⁰ In the late 1940s when the declaration was being drafted postcolonial states and states that had not engaged in colonial rule were in favour of the creation of mechanisms that would be able to enforce human rights in order to resist colonial rule.¹¹ What both of these ideas have in common is the sense that human rights require enforcement. Throughout the 1970s in Africa various sub-regional seminars and meetings met to discuss human rights and the role of human rights in the one

⁶ Tomaševski. (n. 1)

⁷ Joseph Raz ‘Human Rights in the Emerging World Order’ (2010) 1 Transnational Law Review 31, 46.

⁸ Hannah Arendt *The Origins of Totalitarianism* (Harvest Books 1976) 291-3.

⁹ What concerned Arendt, Kesby argues was the capacity to lose rights all together and her argument was for the existence of a community which could guarantee rights, which as Kesby demonstrates later is in part linked to the enforcement of legal rights. Alison Kesby *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012) 4-8.

¹⁰ Francesca Klug *A Magna Carta for all humanity: homing in on Human Rights* (Routledge 2015) 20-22.

¹¹ See chapter 2.

party state and almost all ended with agreement that there was a need for an organisation to enforce human rights within African states.¹² In fact in both chapters three and four it was shown that there was an incentive towards constructing human rights institutions and organisations in order to guarantee enforcement, even though this was subsequently tempered by anti-imperialist opposition.

If the project of international human rights law requires enforcement this then raises the ancillary question of whether it is possible for human rights enforcement to escape from a juridical form which is inherently imperialist. The short answer is that this is unlikely for some of the reasons stated above as enforcement entails making some type of claim as to whether a state's laws are incompatible with an organisation's interpretation of international human rights law. Even if this is something that rarely occurs, it requires the organisation to possess the capacity to make some kind of normative statement about a state's laws with a view to those laws being changed. When coupled with the pressure that an organisation can bring to bear on a state to change its laws, this cumulatively represents the potential to interfere with a state's domestic legal sovereignty. This could be an issue with the very nature of the juridical form of international law itself which, as Peter Fitzpatrick and John Hobson have independently argued, is intertwined with historical practices of imperialism.¹³ As Emmanuel Jouannet argues that if one accepts that imperialism is the "domination and the imposition on others of one's own legal" system over another this means that the very idea of international law has an imperialist element to it as not only did it facilitate colonialism it enabled the ongoing process of material and legal domination.¹⁴ As Jouannet goes on to caution, even though colonial-imperialism may have formally ended the persistence of what this study has termed residual imperialism, means that it is impossible to act as though "imperialism of the legal values embodied in international law ha[s] been disposed of."¹⁵

This can be expanded to a general theory of juridical forms. In *Truth and Juridical Forms*, Foucault argues that the structures of power in society produce knowledge using the juridical forms of the state and creating right and wrong courses of actions.¹⁶ The construction of

¹² Morris Mbondenyi *International Human Rights and their enforcement in Africa* (Law Africa 2011) 106-7.

¹³ See respectively Peter Fitzpatrick "'The desperate vacuum': imperialism and law in the experience of Enlightenment" (1989) *Droit et Société* N° 13, 1989 and John Hobson 'The other side of the Westphalian frontier' from Sanjay Seth (eds.) *Postcolonial Theory and International Relations: A critical introduction* (Routledge 2013).

¹⁴ Emmanuel Jouannet 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 *EJIL* 379, 382.

¹⁵ *Ibid.* 391.

¹⁶ Michel Foucault 'Truth and Juridical Forms' in James Faubion (ed) *Power: Essential Works of Foucault 1954-1984* (Robert Hurley trans. Penguin 1994) 4.

knowledge by juridical processes means that there is not a “relationship of assimilation” with the object of knowledge in society but “rather a relation of distance and domination” and that the creation of a universal knowledge has created a “precarious system of power.”¹⁷ Systems of universal knowledge, as the analysis of *‘Society’ Must be Defended* in the previous chapter demonstrated, can be used to construct a system of universality that is inexorably intertwined with colonial imperialism. It is the system of universal knowledge and the expulsion of those outside of universal knowledge that defines colonialism. Inherent imperialism may well therefore be inescapable within international juridical forms, such as protection mandates, as their dependence on a negative universal reference to construct and maintain justificatory universality envisages the marginalisation of states. Also, as chapter one argued, given that the international system characterised by significant sovereign inequalities between states the process of marginalisation is never going to be equal, the denigration of a postcolonial state’s existential sovereignty by a protection mandate is likely to have a much greater impact.

It is possible that an alternative juridical form of enforcement, one which is truly decolonised and escapes inherent imperialism could exist. However, theorising the conditions that would have to be present for this to occur is beyond the scope of this study, which sought to diagnose the theoretical foundations of anti-imperialist opposition. If I were to offer a tentative sketch of one, the model of the Universal Periodic Review process at the Human Rights Council (HRC) appears to escape the direct problem of having a juridical mechanism that denigrates sovereignty. However, as chapter three demonstrated this was no bar to anti-imperialist opposition. The wider context of the UN, and its residual imperialist structures along with the need to create a broader framework of follow up recommendations, has meant that a legal framework dependent on powers of condemnation is being progressively developed by the HRC. It is also arguable that the lack of existence of an alternate juridical mechanism is not particularly important as imperialism is simply a ‘fixed cost’ of a system of international organisations. If it were not for the consequences of anti-imperialist opposition this would be a pragmatic, if not particularly palatable, conclusion to draw, given the seemingly insurmountable sovereign inequalities affecting the operation of all international organisations. However, one thing I have tried to emphasise throughout this study is that anti-imperialist opposition weakens the protection of human rights and enhances the power of state governments.

¹⁷ Ibid. 12.

In conclusion it is worth noting that whilst international law and the imperialist juridical forms it creates are responsible for generating anti-imperialism this does not in my view automatically invalidate the project of attempting to protect human rights at the supranational level. In the introduction to this study a pragmatic defence of human rights organisations was offered as they often operationalise human rights and can provide a place of refuge, albeit an imperfect one, to those under the most persecution from their government. Additionally human rights law can be substantively decolonised, as chapter four demonstrated, answering many of the criticism raised by anti-imperialist ideological opposition and protecting interests that human rights law did not previously protect in its original Euro-centric model. The critique from those such as Ilan Rua Wall, that the very juridical structure of human rights law may preclude further radical politics is one that is worthy of close attention as it points to broader structural problems with the nature of human rights and their juridical codification.¹⁸ However, in this study I have chosen to focus on human rights law as it is practiced currently by nation states within supranational organisations. Within this framework claims to reprioritise or re-imagine human rights law have more often than not advanced a vision of human rights that is de-radicalised even further than the status quo and has been used to enhance the entrenched constituted power of state governments over their constituted and subject populations. Given that as Foucault said state governments “arrogate to themselves the right to pass off as profit or loss the human unhappiness of their decisions” international human rights law as enforced by human rights organisations offers some form of check upon that.¹⁹

¹⁸ Ilan rua Wall *Human Rights and Constituent Power: Without Model or Warranty* (Routledge 2012) 27-34.

¹⁹ Foucault ‘Confronting Governments: Human Rights’ from *Faubion* (n 16) 474.

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In accordance with OSCOLA 4th edition rules the following abbreviations of journal titles are used in this work:

AJIL – American Journal of International Law

AHRLJ – African Human Rights Law Journal

EJIL – European Journal of International Law

HRLJ – Human Rights Law Journal

HRLR – Human Rights Law Review

HRQ – Human Rights Quarterly

ICLQ – International and Comparative Law Quarterly

IO –International Organisation

MLR –Modern Law Review

TWQ – Third World Quarterly

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